2011

David D. Adams v. Workforce Appeals Board, Department of workforce Services : Brief of Petitioner

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVID D. ADAMS, Petitioner, vs. WORKFORCE APPEALS BOARD, DEPARTMENT OF WORKFORCE SERVICES, Respondent.	Appeal No. 20110406-CA Agency Case Nos. 11-R-00410 and 11-R-00411

BRIEF OF PETITIONER

PETITION FOR REVIEW FROM FINAL DECISION OF THE WORKFORCE APPEALS BOARD

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JURISDICTION OF THIS COURT

The Utah Court of Appeals has original jurisdiction over the filed Petition for Review pursuant to Utah Code Annotated §§35A-4-508(8)(a) and 78A-4-103(2)(g).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Petitioner presents several issues for review:

(1) Was there sufficient evidence that Petitioner was unavailable on or unable to work within the meaning of U.C.A. § 35A-4-403(1)(c)? The Court of Appeals should review the decision of the Workforce Appeals Board with "only moderate deference". *Ekshteyn v. Department of Workforce Services*, 45 P.2d 175 (Utah App. Ct. 2002). Since this matter is an original proceeding before this Court, the issue is preserved with the Petition for Review dated May 17, 2011.

(2) Was there sufficient evidence of fraud to justify the double penalty under U.C.A. § 35A-4-405(5)(c)? The Court of Appeals should review the decision of the Workforce Appeals Board with "only moderate deference". *Ekshteyn v. Department of Workforce Services*, 45 P.2d 175 (Utah App. Ct. 2002). Since this matter is an original proceeding before this Court, the issue is preserved with the Petition for Review dated May 17, 2011.

(3) Did the Department inappropriately treat Petitioner's Motion to Reopen the Hearing as an appeal to the Workforce Appeals Board rather than refer the Motion to the ALJ? The Court of Appeals should review the decision of the Workforce Appeals Board with "only moderate deference". *Ekshteyn v. Department of Workforce Services*, 45 P.2d 175 (Utah App. Ct. 2002). Since this matter is an original proceeding before this Court, the issue is preserved with the Petition for Review dated May 17, 2011.

(4) Did the Department abuse its discretion by refusing to reopen the hearing to permit Adams to submit his evidence? The Court of Appeals should review the decision of the Workforce Appeals Board with "only moderate deference". *Ekshteyn v. Department of Workforce Services*, 45 P.2d 175 (Utah App. Ct. 2002). Since this matter is an original proceeding before this Court, the issue is preserved with the Petition for Review dated May 17, 2011.

STATUTORY AND ADMINISTRATIVE RULE PROVISIONS

Utah Code Ann. § 35A-4-405(5) reads, in part, as follows:

> (a) For each week with respect to which the claimant willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this chapter, and an additional 13 weeks for the first week the statement or representation was made or fact withheld and six weeks for each week thereafter; the additional weeks not to exceed 49 weeks.

(b) The additional period shall commence on the Sunday following the issuance of a determination finding the claimant in violation of this Subsection (5).

(c) (i) Each claimant found in violation of this Subsection (5) shall repay to the division the overpayment and, as a civil penalty, an amount equal to the overpayment.

(ii) The overpayment is the amount of benefits the claimant received by direct reason of fraud.

(iii) The penalty amount shall be regarded as any other penalty under this chapter.

(iv) These amounts shall be collectible by civil action or warrant in the manner provided in Subsections 35A-4-305(3) and (5).

(d) A claimant is ineligible for future benefits or waiting week credit, and any wage credits earned by the claimant shall be unavailable for purposes of paying benefits, if any amount owed under this Subsection (5) remains unpaid.

(e) Determinations under this Subsection (5) shall be appealable in the manner provided by this chapter for appeals from other benefit determinations.

Utah Code Ann. § 35A-4-403(1)(c) reads as follows:

(1) Except as provided in Subsection (2), an unemployed individual is eligible to receive benefits for any week if the division finds:

(c) the individual is able to work and is available for work during each and every week for which the individual made a claim for benefits under this chapter;

Utah Administrative Code R 994-508-117, reads as follows:

Failure to Participate in the Hearing and Reopening the Hearing After the Hearing Has Been Concluded.

(1) If a party fails to appear for or participate in the hearing, either personally or through a representative, the ALJ may take evidence from participating parties and will issue a decision based on the best available evidence.

(2) Any party failing to participate, personally or through a representative, may request that the hearing be reopened.

(3) The request must be in writing, must set forth the reason for the request, and must be mailed, faxed, or delivered to the Appeals Unit within ten days of the issuance of the decision issued under Subsection (1). Intermediate Saturdays, Sundays and legal holidays are excluded from the computation of the ten days in accordance with Rule 6 of the Utah Rules of Civil Procedure. If the request is made after the expiration of the ten-day time limit, but within 30 days, the party requesting reopening must show cause for not making the request within ten days. If no decision has yet been issued, the request should be made without unnecessary delay. If the request is received more than 30 days after the decision is issued, the Department will have lost jurisdiction and the party requesting reopening must show good cause for not making a timely request.

(4) If a request to reopen is not granted, the ALJ will issue a decision denying the request. A party may appeal a denial of the request to reopen to the Board within 30 days of the date of issuance of the decision. The appeal must be in writing and set forth the reason or reasons for the appeal. The appeal can only contest the denial of the request to set aside the default and not the underlying merits of the case except as provided in R994-508- 118(2)(f).

(5) The ALJ may reopen a hearing on his or her own motion if it appears necessary to take continuing jurisdiction or if the failure to reopen would be an affront to fairness.

(6) If the request to reopen is made more than 30 days after the issuance of the ALJ's decision, the ALJ may consider the request or refer it to the Board to be treated as an appeal to the Board.

Utah Administrative Code R 994-508-118, reads as follows:

What Constitutes Grounds to Reopen a Hearing.

(1) The request to reopen will be granted if the party was prevented from appearing at the hearing due to circumstances beyond the party's control.

(2) The request may be granted upon such terms as are just for any of the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the decision. The determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all of the relevant circumstances including:

(a) the danger that the party not requesting reopening will be harmed by reopening;

(b) the length of the delay caused by the party's failure to participate including the length of time to request reopening;

(c) the reason for the request including whether it was within the reasonable control of the party requesting reopening;

(d) whether the party requesting reopening acted in good faith;

(e) whether the party was represented at the time of the hearing. Attorneys and professional representatives are expected to have greater knowledge of Department procedures and rules and are therefore held to a higher standard; and

(f) whether based on the evidence of record and the parties' arguments or statements, taking additional evidence might affect the outcome of the case.

(3) Requests to reopen are remedial in nature and thus must be liberally construed in favor of providing parties with an opportunity to be heard and present their case. Any doubt must be resolved in favor of granting reopening.

(4) Excusable neglect is not limited to cases where the failure to act was due to circumstances beyond the party's control.

(5) The ALJ has the discretion to schedule a hearing to determine if a party requesting reopening satisfied the requirements of this rule or may, after giving the other parties an opportunity to respond to the request, grant or deny the request on the basis of the record in the case.

STATEMENT OF THE CASE

The Petitioner, David D. Adams, (hereinafter "Adams") was employed as Chief Technology Officer with employer, Public Engines, Inc., until he was laid-off in April of 2009. Adams started to receive weekly unemployment benefits on May 9, 2009. Those benefits continued until October 16, 2010. During that period of time Adams certified that he was available for full time work and was searching for work. (R. 87).

Prior to October of 2010, the Respondent Department of Workforce Services (hereinafter "the Department") sent a questionnaire to Adams requesting information regarding his minimum contacts for work for the period of time of April 10, 2010, through October 2, 2010. In his response, Adams stated that he had become discouraged with the traditional job search and began to inquire about business opportunities. Adams reported those meetings to the Department. (R. 05-12).

As a result of the responses to the questionnaire, a Department investigator met with Adams and determined that Adams should be denied further benefits, should be assessed for the over-payment of benefits and be subject to a civil penalty. (R. 013). Adams requested a telephonic hearing before an Administrative Law Judge (hereinafter "ALJ"). (R. 057).

There were, in fact, two separate decisions of the Department. The first decision was a determination that Adams had committed fraud in his reporting to the Department regarding his search for work. This decision resulted in a denial of Adams the right to any future unemployment for 49 weeks and found that Adams was overpaid $33,467.00 and is liable for a civil penalty of $33,467.00. (R. 091-094). The second decision denied Adams benefits for the weeks ending May 9, 2009, through November 20, 2010. (R. 087-090).

The ALJ held the telephonic conference on January 10, 2011, on both decisions. Adams was not represented by counsel. During the hearing Adams requested to submit documents which were denied by the ALJ. (R. 066). On January 12, 2011, the ALJ rendered his decisions affirming the Department's initial decision. (R. 087-094).

At this point, Adams retained counsel. On February 11, 2011, pursuant to R994-508-118, Workforce Services Appeal Procedures, Adams filed a Motion to

Reopen the Hearing before the ALJ. (R. 095-105). Instead, the Department treated the motion as an appeal and referred it to the Respondent Workforce AppeALJ Board (hereinafter "Board"). (R. 106-107). On March 10, 2011, the Board rendered its decisions affirming the ALJ's ruling. (R. 108-144). On March 30, 2011, Adams filed his Request for Reconsideration. (R. 145-149). The Board denied the request on April 19, 2011. (R. 151-154). This Petition for Review was filed on May 17, 2011. (R. 155-157).

STATEMENT OF FACTS

Most of the relevant facts in this matter center around Adams' efforts to seek re-employment between May 9, 2009 and October 16, 2010, during which Adams received 71 weeks of unemployment compensation. (30 weeks in 2009 and 41 weeks in 2010). During that period of time, Adams was paid $33,467.00 in unemployment compensation. He filed weekly claims with the Department stating that he had made at least two qualifying job contacts during the reported week. (R. 094).

Prior to being laid off on April 26, 2009, Adams was chief technology officer of Public Engines, Inc., the employer. (R. 071). After being laid off, Adams described his initial job search as follows:

> Well, it started with, I guess, a combination of kind of traditional, you know, checking job boards, checking different kinds of job listings, applying for jobs that were - that were listed as being available, and then just kind of hitting the networking really hard,

> you know, calling up all of my former colleagues and making contacts and letting people know that I was looking for something new. And as months progressed it - you know, thy applying for jobs that were listed, it became apparent to me that, that wasn't going to be very fruitful.
>
> I never so much as got a call or an email back from any of those, even though I submitted many of them. And I think the reason is because the kind of job that I was that I'm - you know, that I've done for the past fifteen or so years of my career, you don't necessarily get a, you know, top executive position from applying on monster.com. And I'm not even sure why people post the jobs there if they're not going to respond to them.
>
> So I redoubled my efforts in trying to work my professional network and I started to expand it to meeting with people who are in the financing side of the technology start up world because that's been a source for me to find jobs in the past; being kind of identified by folks who are investing in technology companies and can identify position in firms that they are making investments in. So I started in, I'd say, you know, mid to late 2009 putting more efforts into meeting with venture capitalist and angel investors and other people who are in that world.

(R. 071).

Since Adams' previous employment was that of an executive of an early stage technology company, he concentrated his contacts on members of board of directors of such companies who would be expected to hire a person with Adams' experience. (R. 073-074).

Adams' partial list of contacts, provided to the Department in October and November of 2010, demonstrate that Adams had almost sufficient employment contacts between April 10, 2010, and October 2, 2010, to satisfy the Department's

requirements of being available for full-time employment. (R. 014-1016). A more complete list, which does not include all phone calls and some emails contacts and which was not accepted by the ALJ but which was partial considered by the Workforce AppeALJ Board, demonstrate that Adams had sufficient contacts for sixteen (16) weeks in 2009 and nineteen (19) weeks in 2010. (R. 102-105, 066, 119).

As Adams' early search for employment was clearly unsuccessful, he began to change the nature of his search. (R. 074-075). Sometime in mid to late 2009, Adams started to meet with venture capitalists to see if there were any employment opportunities there. (R. 071). The shift from the traditional job search to the inquiries of business opportunities completely occurred in mid 2010. This is reflected in Adams' responses to the Department's audit questionnaire.

In October of 2010, the Department sent to Adams a "Claimant's Questionnaire" for the period of time of April 25, 2010, through October 2, 2010. On October 10, 2010, Adams filled out the questionnaire. (R. 007-012). On October 20, 2010, by email letter, Adams explains the shift in job search strategy. (R. 005-006). Additionally, in early October, 2010, Mr. Adams' son became very sick. This made it difficult for him to focus on responding to the Department's audit. (R. 077).

Two additional facts are important for this appeal. First, during the entire period of time that Adams was receiving unemployment compensation, Adams had a

part time job for five (5) hours at which he earned $125.00 per week. This was reported to the Department. (R. 010-012). Second, the only explanation that Adams received as to the specific requirement for a job search is the written statement contained on page 12 of the Claimant Guide which reads, in its entirety, as follows:

> **Work Search Requirements -**
>
> Your obligation while receiving unemployment benefits is to become reemployed, and you should develop a realistic plan to achieve this objective. A primary component of your re-employment plan will be to contact employers. Unless a Department representative instructs otherwise, you are required to make a good faith effort to seek full-time work each week that you claim benefits, even if you are employed part time.
>
> Additional job-development activities that will enhance your prospects of finding work include: writing resumes, visiting employers' web sites, networking, contacting private or church employment agencies or visiting a DWS Employment Center. The phrase -"good faith effort to seek work" means that you will consistently make the types of personal efforts to find work that are customary for persons in the same or similar occupations. Your efforts must reflect a genuine desire to obtain employment immediately.
>
> **You should make at least two contacts each week with employers not previously contacted.** If you do not make at least two new contacts during a given week, you may be denied benefits; however, the Department will evaluate your overall work- search efforts during the week before making an eligibility determination.
>
> You are required to keep a detailed record of your work search activities. You may be selected at any time for an audit or eligibility review dung which you will asked to provide this information. Your record of employer contacts should include the

following: (1) date of contact, (2) company name and phone number, (3) person contacted, (4) type of work, (5) method of contact and (6) results. **Failure to provide this information upon request may result in a denial of benefits and possible overpayments and penalties.**

As your period of unemployment continues, you must expand your work search to include work at lower rates of pay. [Emphasis in original]

(R. 109-110).

SUMMARY OF ARGUMENT

Under Utah statute, Department rules and the Claimant Guide, networking can be sufficient employer contacts to satisfy the requirement that claimants be aggressively looking for re-employment. The use of "willfully" in U.C.A. § 35A-4-405(5) requires that the Department find that the scienter component of fraud be satisfied before assessing a double penalty against a claimant who misreported his employer contacts. The Department rules require that the ALJ, first, be given the opportunity to consider reopening a case before the case is appealed to the Workforce Appeals Board. Finally, there is sufficient good cause to reopen this case.

ARGUMENT

POINT I: NETWORKING IS JOB CONTACTING.

There is a central dispute between Adams, who aggressively looked for employment by networking, and the Department, which refuses to count said network contacts as a part of Adams' required job search. The Workforce Appeals Board specifically held that Adams' contacts were ..."discussions [which] might be appropriate network opportunities but are not job contacts". (R. 122).

The basis of the Department's conclusion must first be found in statute. U.C.A. § 35A-4-403(1)(c) reads in part that in order for the claimant to receive unemployment benefits he must be "able to work and is available for work during each and every week for which" he claims benefits. The Department has appropriately refined the above statute by rule regarding the claimant's necessary job search. R994-403-113c, Work Search, reads in part as follows:

> (1) General Requirements.
>
> A claimant must make an active, good faith effort to secure employment each and every week for which benefits are claimed. Efforts to find work must be judged by the standards of the occupation and the community.
>
> (2) Active.
>
> An active effort to look for work is generally interpreted to mean that each week a claimant should contact a minimum of

four employers not previously contacted unless the claimant is otherwise directed by the Department. Those contacts should be made with employers that hire people in the claimant's occupation or occupations for which the claimant has work experience or would otherwise be qualified and willing to accept employment. Failure of a claimant to make at least the minimum number of contacts creates a rebuttable presumption that the claimant is not making an active work search. The claimant may overcome this presumption by showing that he or she has pursued a job development plan likely to result in employment. A claimant's job development activities for a specific week should be considered in relation to the claimant's overall work search efforts and the length of the claimant's unemployment. Creating a job development plan and/or writing resumes may be reasonable and acceptable activities during the first few weeks of a claim, but may be insufficient after the claimant has been unemployed for several weeks.

(3) Good Faith.

Good faith efforts are defined as those methods which a reasonable person, anxious to return to work, would make if desirous of obtaining employment. A good faith effort is not necessarily established simply by making a specific number of contacts to satisfy the Department requirement.

It must be noted that the above rule does not restrict job contacts from networking contacts. The only restriction is that the contacts be with "employers" or more appropriately potential employers. There can be no dispute that most of Adams' contacts were with potential employers.

The Department further refined the above quoted rule by describing the work search requirements is the "Claimant Guide". The entire "work search requirement" section is quoted above on pages 11-12 of this Brief. (R. 109). That section also

does not restrict job contacts to anything other than "employers" and in fact, the section encourages "networking".

Despite the above liberal description and encouragement of using networking as a part of an aggressive job search, the Workforce Appeals Board held:

> The Board notes that the above rules doe not require a claimant to submit a resume or letter of interest for an action position, as stated by the Department investigator in the hearing on this matter, but that the contact be with an employer that employs people in the claimant's field or a filed in which the claimant is willing and able to accept work. Thus, the type of contact contemplated by the rule is contact with someone who might potentially hire the claimant in the future. Contact with someone who might be able to give the claimant leads to other companies or individuals who might hire the claimant, usually referred to as "networking," is certainly an essential part of any job search effort. However, networking is not the same thing as making a job contact.

(R. 122).

The rulings in this matter by the Department are the first time, identified in the record, to which Adams was made aware that network contacts could not be counted as a part of his job search requirement.[1]

Despite Adams' good faith use of networking contacts as his employer contacts for reporting purposes, it is not disputed that Adams' record keeping and reports of

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[1] There is a reference in the Workforce Appeals Board's Decision that Adams was given an explanation as to his "responsibility" by a Department representative and the Claimant Guide. (R. 139). However, there is no evidence in the record that Adams received any direction other than the Claimant Guide until after the Department started its investigation.

contacts is not of the quality traditionally expected by the Department. However, it must first be remembered that the Department, with its October 2010 Claimant Questionnaire, only requested reports on the employer contacts for April 25, 2010, through October 2, 2010, a period of only 23 weeks. With his October 20, 2010 letter, Adams reported 38 contacts. Later he was able to report 3 more contacts. It is clear from the record that only one of these contacts was what the Department would describe as a traditional employer contact, the rest were networking contacts. It is also clear from Adams' more detailed reporting and a reporting more consistent with Department requirements that, during the 23 week period, Adams had two or more contacts during 14 weeks of the 23 weeks.

The Department, prior to the ALJ hearing, never formally requested Adams' reports for the 47 weeks between April 29, 2009, and April 24, 2010, during which Adams received unemployment benefits. The Department merely extrapolated from the requested reports back over the previous year. This is, despite the fact that the record is very clear on this, that Adams started his job search in the most traditional manner and only gradually shifted to counting networking contacts.

From the documents submitted, but not accepted by the ALJ, it is clear that Adams had two or more contacts in 22 of the 47 weeks between April 29, 2009, and April 24, 2010. (Adams testified that there were many more contacts but he did not

have a written record of all the phone calls he made.) Had the Department given Adams proper notification to produce his records for that period of time and had Adams been given an appropriate opportunity to produce those records, it is possible that better quality compliance would be obtained.

It is clear from the record that Adams complied with the reporting required for some but not all the weeks for which he received unemployment benefits. It is inappropriate for the Department to totally to deny all benefits for only spotty reporting.

Because the statute, rules, and "Claimant Guide" to not exclude network contacts as appropriate employer contacts, Adams should receive appropriate credit for those contacts pursuant to U.C.A. § 35A-4-403(1)(c). The Department never made this clear to Adams until after it had started the investigation. Further, it is admitted that Adams' records of contacts are not of the quality requested by the Department. However, the records are sufficient to show that Adams had sufficient employer contacts for over half the weeks for which he received benefits. The Department should not totally deny benefits.

POINT II: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A PENALTY PURSUANT TO U.C.A. § 35A-4-405(5).

Even if it could be argued that networking contacts can not be utilized by a claimant as employer contacts within the meaning of the statute and the rules, it certainly should not follow that a good faith reporting of network contacts is, per se, evidence of fraud within the meaning of U.C.A. § 35A-4-405(5).

Utah Appellant Courts have had several occasions to interpret the meaning of U.C.A. § 35A-4-405(5). The Workforce Appeals Board in its Decision cited, in this matter, to two such cases, *Baker v. Department of Employment Sec.*, 564 P.2d 1126 (Utah, 1977) and *Mineer v. Board of Review*, 572 P.2d 1364 (Utah, 1977). However, these two cases are not comparable to the case at hand. The *Baker* and *Mineer* cases, along with virtually every other appellate case interpreting U.C.A. § 35A-4-405(5), involve situations where claimants falsely reported weekly wages earned. In *Mineer*, after the claimant had inappropriately under reported his earnings, the Supreme Court held:

> The intention to defraud is shown by the claims themselves which contain false statements and fail to set forth material facts required by statute. The filing of such claims evidences a purpose or willingness to present a false claim in order to obtain unlawful benefits and hence are manifestations of intent to defraud.

572 P.2d at 1366. This above quote language has been repeated by courts over and over.

It is inapplicable to the case at hand because we are not dealing with a situation of the under reporting of wages received; we are dealing with a "misreporting" of employer contacts.

The Department, with its interpretation of the past case law, has made every misreporting of a material fact by a claimant a fraud, subject to double penalty. This is an inappropriate reading of U.C.A. § 35A-4-405(5) because it removes the scienter component from the analysis as to when a double penalty is required.

The Utah Supreme Court examined when scienter is required in defining "willingness" in the case of *Green v. Turner, et al.*, 4 P.3d 789 (Utah, 2000). In that case, the Court had to decide whether a county commissioners' action was "willful conduct" requiring the payment of attorney's fees. The Court held as follows:

> In the instant case, section 17-5-207 does not expressly indicate whether the term "willfully" includes an implied component. As both *Larsen* and *Worthen* illustrate, the inclusion or exclusion of a scienter requirement depends largely on the context and purposes of the statute or rule at issue. In *Osguthorpe*, for instance, we held no scienter requirement was implicated in a "willful" failure to respond to discovery. On the other hand, in *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 1999 UT 13, ¶¶ 14-15, 974 P.2d 288, 293-94 we revisited the Uniform Securities Act previously construed by Larsen and held that scienter was required with respect to a different subsection of the

> Act. Specifically, we concluded that section 61-1-1(1) of the Act, which proscribes any "device, scheme, or artifice to defraud," implicitly required scienter. We relied heavily on interpretations of the Uniform Act in other jurisdictions, which in turn had found a scienter requirement implicitly necessary to the concepts of "device," "scheme," or "artifice" to defraud. Thus, in two different cases treating precisely the same word in section 61-1-21 of the Uniform Securities Act, we attributed different interpretations. When interpreted in conjunction with subsection 61-1-1(2) of the Act, the term "willfully" did not include a scienter requirement, but when interpreted in conjunction with the preceding subsection 61-1-1(1), "willfully" did include such a requirement. [Citations omitted.]

4 P.3d 793-794.

The statute in our case uses the term "willfully" but it is silent as to a scienter component. Clearly, using the *Turner* analysis, the content of the statute is to avoid fraud. This is especially true when the statute calls for a double penalty. The Department rules interpret U.C.A. § 35A-4-405(5) using the word "Fraud." See R994-406-403 and R994-406-405. The Department, in cases involving misstatements of employment contacts, should be required to satisfy a scienter component before assessing a double penalty. There is nothing in the record to indicate that Adams was attempting to defraud the Department by reporting his network contacts as employment contacts. This case is not like the other appellate

court cases where the misreporting was the failure to disclose wages actually received by a claimant.

Adams in food faith reported his networking contacts. The Department first found this reporting to be wrong and then, with no additional evidence, found this reporting to be fraudulent. There is no competent evidence in the record to satisfy a scienter component.

POINT III: THE ALJ SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO REOPEN THIS CASE.

The Department believes that the two rules covering reopening of cases, R994-508-117 and R994-508-118, only permit an ALJ to consider request to reopening a hearing should the claimant have failed to participate in the initial hearing. As a result of this interpretation, the Department, unilaterally, referred Adams' Motion to Reopen to the Workforce Appeals Board as an appeal.

The Department bases its interpretation upon R944-508-117(2), which reads:

> Any party failing to participate, personally or through a representative, may request that the hearing be reopened.

The Department's reasoning is that, unless you come within this section, you can not ask an ALJ to reopen a case. However, that is too narrow a reading of the rule; it completely ignores R944-508-117(5) which reads:

> The ALJ may reopen a hearing on his or her own motion if it appears necessary to take continuing jurisdiction or if the failure to reopen would be an affront to fairness.

This section grants the ALJ authority beyond merely reopening hearings where a party has not appeared. Further, how can the ALJ determined "if the failure to reopen would be an affront to the fairness" unless a party informs the ALJ of the issues in a request for reopening.

R944-508-118 states the grounds upon which a request to reopen a hearing can be granted. The first ground clearly deals with a situation were a party does not appear at a hearing; however, the remaining grounds stated in the rule are clearly far broader than a non-appearance situation. To draft such a broad rule, and grant to the ALJ such broad authority and then to deny to parties and the ALJ the opportunity to present a rational for reopening a case, makes no sense.

Denying Adams the right to present his request to reopen to the ALJ, who heard the matter, is inconsistent with a broad reading of the rules and a restriction of the broad powers granted to the ALJ by the rules. The Department should not have unilaterally sent Adams' Request to Reopen to the Workforce Appeals Board.

POINT IV: THE RECORD SHOULD BE REOPENED TO COMPLETE THIS CASE.

In this case, it must be remembered that with the Department's Claimant Questionnaire, during the Department's investigation, and during the Department's

initial assessment of Adams' claims, Adams was only requested to provide records for the last 23 weeks, not for the previous year during which he received unemployment benefits. Is it any wonder that a non-lawyer would be confused that he is being denied all his benefits based upon an analysis of the last 23 weeks?

It is true that the notice sent by the Department, when read by a lawyer, is very clear about what will be necessary at an ALJ hearing, but it is equally clear that those notices to a non-attorney may be confusing and are certainly intimidating. A complete review of the hearing transcript demonstrates that Adams was confused with what he needed to do. One extremely critical example is the documents he prepared with all his employer contacts. The ALJ did not permit him to introduce the document into the record. However, any attorney or judge could have told him to read the document into the record. Adams was not directly told this and the Workforce Appeals Board, in its Decision, chastises Adams for not reading the document into the record.

It certainly has been the policies of administrative agencies, the courts, and a general sense of comedy that non-lawyer litigants in administrative settings should be helped in the presentment of their cases and not tricked. The list prepared by Adams for the hearing should have been made a full part of the record and all its contents regarding contacts with potential employers considered.

CONCLUSION

Based on the above, this Court should reverse the double penalty assessed against Adams because the Department did not prove the scienter component of "willfully." Further, although Adams's written records were not of the required quality to demonstrate sufficient employer contacts, there was appropriate evidence that Adams had sufficient contacted in 36 of the 71 weeks for which he received unemployment benefits. As a result, his overpayment should be cut in half. Alternatively, should this Court find that the record is insufficient to dertermine how many weeks Adams had sufficient employer contacts, this matter should be remanded to the ALJ or to the Workforce Appeals Board with instructions to reopen the record to take further evidence on Adams' employer contacts.

Respectfully submitted this _____ day of September, 2011.

JOSEPH E. HATCH
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that on the _____ day of September, 2011, I caused two true and correct copies of the foregoing BRIEF OF PETITIONER to be mailed, postage prepaid, addressed to:

Amanda B. McPeck
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
Salt Lake City UT 84145-0244

_____

APPENDIX "A"

Form APDEC 10

DEPARTMENT OF WORKFORCE SERVICES
APPEALS UNIT
Decision of Administrative Law Judge

Appellant

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525

S.S.A. NO: XXX-XX-4307 CASE NO: 10-A-19781

APPEAL DECISION: The Department finding of fraud is affirmed in its entirety.

CASE HISTORY:

Appearances:	Claimant / Department witness		
Issues to be Decided:	35A-4-405(5)	-	Fraud
	35A-4-406(4)	-	Fault Overpayment

The original Department decision denied unemployment insurance benefits for the weeks ending May 9, 2010, through October 16, 2010, on the grounds the Claimant failed to accurately report his work search efforts and, therefore, knowingly withheld material information in order to receive benefits to which he was not entitled. The Claimant was further disqualified for 49 weeks, beginning December 5, 2010, and ending November 12, 2011. That decision also created an overpayment in the amount of $33,467, representing the amount received as a direct result of fraud, and a civil penalty of $33,467, resulting in a total overpayment of $66,934.

APPEAL RIGHTS: The following decision will become final unless, within **30 days** from **January 12, 2011**, further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at http://www.jobs.utah.gov/appeals) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT:

The Claimant filed a claim for unemployment benefits effective April 26, 2009, after being separated from his position as chief technology officer for Public Engines, Inc. He filed weekly claims until exhausting the claim with the week ending November 21, 2009. He filed a claim for Emergency Unemployment Compensation effective November 22, 2009, and filed on that claim through the week ending April 24, 2010. At that time he became eligible again for a regular unemployment insurance claim effective April 25, 2010, on which he filed weekly claims through the week ending October 16, 2010. The Claimant certified

each week that he was able and available for full-time work and was searching for work as required by the Department. He was paid $33,467 in benefits and stimulus payments for those weeks.

In October 2010 the Claimant was asked to complete a questionnaire from Benefit Payment Control to ensure benefits were properly paid to the Claimant. The Claimant returned the questionnaire but did not provide details regarding his weekly work search contacts. The Department required the Claimant to show evidence of a good faith, active work search effort and show evidence of a minimum of two contacts with new employers each week. In his letter to the Department on October 20, 2010, the Claimant stated that he "decided months ago that [his] best option was not to look for a job, but to make [his] own...." He reported he had been meeting with venture capitalists and other investors to raise money for a new enterprise in hopes of employing him and others. The Claimant provided a list of names of individuals and companies but provided no dates or details of the results of his contacts or positions sought. The Claimant was concerned about having the Department contact the individuals he had listed as he worried it may by a black mark against him to have the unemployment insurance office checking up on him. The Claimant's initial list to Benefit Payment Control was included in the exhibits for the hearing but no additional list was provided.

On November 16, 2010, the Claimant met with an investigator from Benefit Payment Control. In the meeting the Claimant explained his efforts in trying to get financing for one specific company in hopes of it leading to a job for him and others. He reported that as far as specifically applying for a listed job posting, he had only had about four such attempts since January 2010. His efforts had been focused more on networking and meeting with venture capitalists. He did not provide evidence of two new job contacts each week as expected by the Department. The Department considers a contact to be an application or submission of a letter of interest or resume for a verifiable position for which the Claimant may be eligible. Efforts to establish self employment or develop one's own business opportunities do not meet the Department's requirements. Over the course of filing for benefits the Claimant met with investors and individuals on the boards of directors with companies in various stages of growth. He had 95 meetings and also contacted others by phone and email. In some instances he was aware of an actual available position but in many cases was not aware of an available position. Since September 2010 he has focused primarily on trying to raise money with one specific company to gain employment.

The Claimant received a *Claimant Guide* and read it. The *Claimant Guide* explains that the Department requires the Claimant to keep a detailed record of his work search activities, including dates of contact, company names and phone numbers, person contacted, type of work, method of contact and results. It explains that additional job development activities like networking to enhance job prospects can also be a part of a plan to achieve employment. The *Claimant Guide* further explains that failure to provide requested information regarding work search activities could result in a denial of benefits and possible overpayments and penalties. The Claimant did not contact the Department with any questions about the work search requirements or to clarify what was required.

REASONING AND CONCLUSIONS OF LAW:

In a related case, 10-A-19782, the Administrative Law Judge found the Claimant was properly denied benefits for the weeks ending May 9, 2009, through October 16, 2010, because the Claimant failed to search for work as required by the Department. Because the Claimant was denied benefits for those weeks and had already been paid, an overpayment must be established.

Section 35A-4-405(5) of the Utah Employment Security Act provides that an individual is ineligible for benefits or for purposes of establishing a waiting period if the claimant willfully made a false statement or misrepresentation or knowingly failed to report a material fact to obtain any benefit under the act. The unemployment insurance rules pertaining to this section provide, in part:

R994-406-401. Claimant Fraud.

(1) All three elements of fraud must be proved to establish an intentional misrepresentation sufficient to constitute fraud. See section 35A-4-405(5). The three elements are:

(a) Materiality.

(i) Materiality is established when a claimant makes false statements or fails to provide accurate information for the purpose of obtaining;

(A) any benefit payment to which the claimant is not entitled, or

(B) waiting week credit which results in a benefit payment to which the claimant is not entitled.

(ii) A benefit payment received by fraud may include an amount as small as one dollar over the amount a claimant was entitled to receive.

(b) Knowledge.

A claimant must have known or should have known the information submitted to the Department was incorrect or that he or she failed to provide information required by the Department. The claimant does NOT have to know that the information will result in a denial of benefits or a reduction of the benefit amount. Knowledge can also be established when a claimant recklessly makes representations knowing he or she has insufficient information upon which to base such representations. A claimant has an obligation to read material provided by the Department or to ask a Department representative when he or she has a question about what information to report.

(c) Willfulness.

Willfulness is established when a claimant files claims or other documents containing false statements, responses or deliberate omissions. If a claimant delegates the responsibility to personally provide information or allows access to his or her Personal Identification Number (PIN) so that someone else may file a claim, the claimant is responsible for the information provided or omitted by the other person, even if the claimant had no advance knowledge that the information provided was false or important information was omitted.

(2) The Department relies primarily on information provided by the claimant when paying unemployment insurance benefits. Fraud penalties do not apply if the overpayment was the result of an inadvertent error. Fraud requires a willful misrepresentation or concealment of information for the purpose of obtaining unemployment benefits.

(3) The absence of an admission or direct proof of intent to defraud does not prevent a finding of fraud.

Materiality is established. The Claimant was overpaid unemployment benefits because he reported he had searched for work as required by the Department when he had not.

Knowledge is established. The Claimant knew or should have known what the Department required concerning his work search efforts. He had received the *Claimant Guide* which provides detailed instructions about the Department's requirements to demonstrate a good faith, active work search. He knew or should have known he was required to keep detailed records of his job contacts and need to provided them upon request.

Willfulness is established. The Claimant filed weekly claims containing inaccurate information. He could have followed the Department's requirements and sought clarification prior to filing his weekly claims if he had any questions about what would constitute qualifying job contacts. The overpayment does not appear to be the result of an inadvertent error.

The elements of fraud have been established by clear and convincing evidence. The finding of fraud is affirmed in its entirety for the weeks ending May 9, 2009, through October 16, 2010.

DECISION AND ORDER:

The Department's decision denying benefits for the weeks ending May 9, 2009, through October 16, 2010, and which disqualified the Claimant for 49 additional weeks, beginning December 5, 2010, and ending November 12, 2011, pursuant to Section 35A-4-405(5) of the Utah Employment Security Act, is affirmed. The overpayment of $33,467 and the civil penalty of $33,467 are also affirmed.

If the Claimant is unable to repay the overpayment immediately, he should contact the Collections Unit at 801-526-9235 or write to: PO Box 45288, Salt Lake City, UT 84145-0288, to make arrangements for repayment.

Joshua Hawkins
Administrative Law Judge
DEPARTMENT OF WORKFORCE SERVICES

Issued: **January 12, 2011**

JH/kf

APPENDIX "B"

Form APDEC
11

DEPARTMENT OF WORKFORCE SERVICES
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525

S.S.A. NO: XXX-XX-4307 CASE NO: ~~10-A-19782~~

APPEAL DECISION: The Department's decision is affirmed.

CASE HISTORY:

Appearances: Claimant / Department witness
Issues to be Decided: 35A-4-403(1)(c) - Able and Available

The original Department decision denied unemployment insurance benefits for the weeks ending May 9, 2009, through October 16, 2010, on the grounds the Claimant did not search for work as required by the Department and thus was not able and available for full-time work.

APPEAL RIGHTS: The following decision will become final unless, within **30 days** from **January 12, 2011**, further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at http://www.jobs.utah.gov/appeals) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT:

The Claimant filed a claim for unemployment benefits effective April 26, 2009, after being separated from his position as chief technology officer for Public Engines, Inc. He filed weekly claims until exhausting the claim with the week ending November 21, 2009. He filed a claim for Emergency Unemployment Compensation effective November 22, 2009, and filed on that claim through the week ending April 24, 2010. At that time he became eligible again for a regular unemployment insurance claim effective April 25, 2010, on which he filed weekly claims through the week ending October 16, 2010. The Claimant certified each week that he was able and available for full-time work and was searching for work as required by the Department. He was paid $33,467 in benefits and stimulus payments for those weeks.

In October 2010 the Claimant was asked to complete a questionnaire from Benefit Payment Control to ensure benefits were properly paid to the Claimant. The Claimant returned the questionnaire but did not provide details regarding his weekly work search contacts. The Department required the Claimant to show

evidence of a good faith, active work search effort and show evidence of a minimum of two contacts with new employers each week. In his letter to the Department on October 20, 2010, the Claimant stated that he "decided months ago that [his] best option was not to look for a job, but to make [his] own...." He reported he had been meeting with venture capitalists and other investors to raise money for a new enterprise in hopes of employing him and others. The Claimant provided a list of names of individuals and companies but provided no dates or details of the results of his contacts or positions sought. The Claimant was concerned about having the Department contact the individuals he had listed as he worried it may by a black mark against him to have the unemployment insurance office checking up on him. The Claimant's initial list to Benefit Payment Control was included in the exhibits for the hearing but no additional list was provided.

On November 16, 2010, the Claimant met with an investigator from Benefit Payment Control. In the meeting the Claimant explained his efforts in trying to get financing for one specific company in hopes of it leading to a job for him and others. He reported that as far as specifically applying for a listed job posting, he had only had about four such attempts since January 2010. His efforts had been focused more on networking and meeting with venture capitalists. He did not provide evidence of two new job contacts each week as expected by the Department. The Department considers a contact to be an application or submission of a letter of interest or resume for a verifiable position for which the Claimant may be eligible. Efforts to establish self employment or develop one's own business opportunities do not meet the Department's requirements. Over the course of filing for benefits the Claimant met with investors and individuals on the boards of directors with companies in various stages of growth. He had 95 meetings and also contacted others by phone and email. In some instances he was aware of an actual available position but in many cases was not aware of an available position. Since September 2010 he has focused primarily on trying to raise money with one specific company to gain employment.

The Claimant received a *Claimant Guide* and read it. The *Claimant Guide* explains that the Department requires the Claimant to keep a detailed record of his work search activities, including dates of contact, company names and phone numbers, person contacted, type of work, method of contact and results. It explains that additional job development activities like networking to enhance job prospects can also be a part of a plan to achieve employment. The *Claimant Guide* further explains that failure to provide requested information regarding work search activities could result in a denial of benefits and possible overpayments and penalties. The Claimant did not contact the Department with any questions about the work search requirements or to clarify what was required.

REASONING AND CONCLUSIONS OF LAW:

In the hearing the Claimant asked about submitting an updated list of contacts for consideration. He had not read or understood the directions in the hearing notice about submitting any additional documents to the other parties at least three days in advance of the hearing. The Administrative Law Judge denied the request to submit any additional documentation to be considered in the hearing.

Section 35A-4-403(1)(c) of the Utah Employment Security Act provides that an unemployed individual is eligible to receive benefits with respect to any week only if the claimant is able to work and is available for work, and acted in good faith in an active effort to secure employment. The unemployment insurance rules pertaining to this section provide, in part:

R994-403-113c. Work Search.

(1) General Requirements.

A claimant must make an active, good faith effort to secure employment each and every week for which benefits are claimed. Efforts to find work must be judged by the standards of the occupation and the community.

(2) Active.

An active effort to look for work is generally interpreted to mean that each week a claimant should contact a minimum of two employers not previously contacted unless the claimant is otherwise directed by the Department. Those contacts should be made with employers that hire people in the claimant's occupation or occupations for which the claimant has work experience or would otherwise be qualified and willing to accept employment. Failure of a claimant to make at least the minimum number of contacts creates a rebuttable presumption that the claimant is not making an active work search. The claimant may overcome this presumption by showing that he or she has pursued a job development plan likely to result in employment. A claimant's job development activities for a specific week should be considered in relation to the claimant's overall work search efforts and the length of the claimant's unemployment. Creating a job development plan and/or writing resumes may be reasonable and acceptable activities during the first few weeks of a claim, but may be insufficient after the claimant has been unemployed for several weeks.

(3) Good Faith.

Good faith efforts are defined as those methods which a reasonable person, anxious to return to work, would make if desirous of obtaining employment. A good faith effort is not necessarily established simply by making a specific number of contacts to satisfy the Department requirement.

The Claimant testified of his efforts to obtain employment throughout the time he was filing for benefits. He appears to have been diligent in networking to create opportunities for potential work. However, the Claimant's efforts do not satisfy the Department's requirements of making two contacts each week with new employers to obtain full-time employment as an employee. In many instances the Claimant was not specifically applying for an open position but was meeting with investors to try to create possible work opportunities. The Claimant did not provide detailed records of specific contacts to the Department when requested in his initial meeting, nor did he provide specific contacts for the hearing. He has not established that he met the requirement for eligibility by searching for work as required by the Department throughout the time he applied for benefits. Based on a preponderance of the evidence, the Claimant was not able and available for full-time work because of the lack of work search. Benefits are denied.

DECISION AND ORDER:

The original Department decision denying the payment of unemployment insurance benefits pursuant to Section 35A-4-403(1)(c) of the Utah Employment Security Act is affirmed. Benefits are denied for the weeks ending May 9, 2009, through November 20, 2010.

Joshua Hawkins
Administrative Law Judge
DEPARTMENT OF WORKFORCE SERVICES

Issued: January 12, 2011

JH/kf

APPENDIX "C"

Form BRDEC
Issue 10

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

DAVID D. ADAMS, CLAIMANT
S.S.A. No. XXX-XX-4307 :

:

Case No. 11-B-00184

DEPARTMENT OF WORKFORCE SERVICES :

DECISION OF WORKFORCE APPEALS BOARD:
The decision of the Administrative Law Judge is affirmed.
Benefits are denied.
The fraud overpayment of $66,934 remains in effect.

HISTORY OF CASE:

In a decision dated January 12, 2011, Case No. 10-A-19781, the Administrative Law Judge affirmed the Department decision holding the Claimant failed to accurately report his work search efforts and knowingly withheld material information from the Department during the weeks ending May 9, 2009, through October 16, 2010, in order to obtain benefits to which he was not entitled. The Administrative Law Judge's decision, therefore, denied benefits for those plus 49 additional weeks from December 5, 2010, until November 12, 2011, and required the Claimant to repay $66,934 to the Utah Unemployment Compensation Fund.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

CLAIMANT APPEAL FILED: February 12, 2011.

ISSUES BEFORE THE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF THE UTAH EMPLOYMENT SECURITY ACT:

1. Did the Claimant knowingly withhold material information in order to obtain benefits to which he was not entitled pursuant to the provisions of §35A-4-405(5)?

2. Was the overpayment correctly established pursuant to the provisions of §§35A-4-405(5) and 35A-4-406(4)?

FACTUAL FINDINGS:

The sentence, "The Department considers a contact to be an application or submission of a letter of interest or resume for a verifiable position for which the Claimant may be eligible," is stricken because the statement is not in keeping with R994-403-113c(2) which states, "contacts should be made with employers that hire people in the claimant's occupation or occupations for which the claimant has work experience or would otherwise be qualified and willing to accept employment."

With this correction, the findings of fact of the Administrative Law Judge are adopted in full.

REASONING AND CONCLUSIONS OF LAW:

The Claimant opened a claim for unemployment insurance benefits in April 2009 using the Department's Internet filing system. After the Claimant provided the information requested on the application, the Claimant was given several instructions, including:

> You must be able and available for and actively seeking full time work by making at least 2 new job contacts each week. You must keep a written record of your job contacts.

And:

> You will receive a claimant guide within a week. You will be held responsible for knowing the information in this guide. If you have any questions, call the Claims Center.

On May 14, 2009, the Claimant certified he had received a copy of the *Claimant Guide: Unemployment Insurance Benefits*. The *Claimant Guide* provides instructions regarding the Claimant's obligation to actively seek work and to maintain a detailed record of his work search. Page 12 of the *Claimant Guide* (Rev 1/09) states, in pertinent part:

> **Work Search Requirements**
>
> Your obligation while receiving unemployment benefits is to become reemployed, and you should develop a realistic plan to achieve this objective. A primary component of your re-employment plan will be to contact employers. Unless a Department representative instructs otherwise, you are required to make a good faith effort to seek full-time work each week that you claim benefits, even if you are employed part time.
>
> Additional job-development activities that will enhance your prospects of finding work include: writing resumes, visiting employers' web sites, networking, contacting

> private or church employment agencies or visiting a DWS Employment Center. The phrase "good faith effort to seek work" means that you will consistently make the types of personal efforts to find work that are customary for persons in the same or similar occupations. Your efforts must reflect a genuine desire to obtain employment immediately.
>
> **You should make at least two contacts each week with employers not previously contacted.** If you do not make at least two new contacts during a given week, you may be denied benefits; however, the Department will evaluate your overall work-search efforts during the week before making an eligibility determination.
>
> You are required to keep a detailed record of your work search activities. You may be selected at any time for an audit or eligibility review during which you will be asked to provide this information. Your record of employer contacts should include the following: (1) date of contact, (2) company name and phone number, (3) person contacted, (4) type of work, (5) method of contact and (6) results. **Failure to provide this information upon request may result in a denial of benefits and possible overpayments and penalties.**
>
> As your period of unemployment continues, you must expand your work search to include work at lower rates of pay. [emphasis in original]

Pages 22 and 23 of the *Claimant Guide* provide a Job Search Record, which is a chart wherein claimants may record job contacts. The chart provides space to record the date of the contact, the name of the person contacted, the company name and phone number, the method of contact, the type of work, and the results of the contact.

The Claimant opened an emergency claim for benefits in December 2009. He filed that claim by contacting the Claims Center. A claims center representative read the Claimant the same instructions quoted above regarding seeking work, keeping a written record of job contacts, and reviewing the *Claimant Guide*. On December 14, 2009, the Claimant certified he had received another copy of the *Claimant Guide*. He opened a new claim for benefits in April 2010. He also filed that claim by contacting the Claims Center. A claims center representative again read the Claimant the above quoted instructions. On May 10, 2010, the Claimant certified he had received yet another copy of the *Claimant Guide*.

The Claimant filed weekly claims for benefits between April 25, 2009, and December 4, 2010, using the Department Internet filing system. Each week the Claimant was asked, "Did you contact employers for work as you were instructed by the Department?" and "Were you physically able and available for full time work?" Each week the Claimant answered, "yes," to those questions, then certified under penalty of law he had answered the questions truthfully and accurately. The Claimant

received a total of $33,467 in unemployment insurance benefits and federal economic stimulus benefits in 2009 and 2010.

On October 5, 2010, the Department sent the Claimant a "Claimant Questionnaire." The questionnaire indicated the Claimant's answers would be used to determine if he was paid unemployment insurance benefits properly. Among other things, the questionnaire inquired about whether the Claimant was self-employed and whether he was looking for full-time work for himself with a regular employer. The questionnaire asked the Claimant to provide a list of job search contacts, including the date of contact, the name of the person contacted, whether the person was contacted in person or by phone, the type of work sought, the full name, address, and phone number of each company, and the results of the contact. The weekly work search contacts form further indicated the Department may verify job contacts with the potential employers listed on the completed form.

On October 20, 2010, the Claimant prepared a letter to the Department investigator. The letter stated, in part:

> I received the audit notification earlier this month, and though I immediately filled out the required forms, I have been unable to fill out the requested "Weekly work search contacts." And I've been delaying sending the paperwork back in because I've been uncertain about how to proceed.
>
> I realized months ago that it was going to be very difficult for me to find the kind of executive-level position at a software company that I'm qualified for, and during the past couple of months, I've only had one "official" job-seeking contact. . . .
>
> I decided months ago that my best option was not to look for a job, but to make my own, and so I have been working tirelessly meeting with Venture Capitalists and other investors trying to raise money for a new enterprise that will not only employ me, but at least a dozen other Utahns too. In this letter, I will catalog all of the investors that I have met with, and the various conferences I've attended in order to expand my network. One of the reasons I was uncertain about sending this letter, however, is that I understand that as a part of your audit, you're going to want to verify my work search contacts, but I feel very uneasy about the Department of Workforce Services contacting these investors. What I would ask is that if you need verification, please contact me, and I'll meet with you in person and we can discuss ways that you can verify that I made these contacts.

The Claimant then listed 34 investors with whom he had met and four venture capital/startup conferences he had attended. The Claimant faxed the letter and a completed copy of the questionnaire to the Department investigator on October 30, 2010. He also attached a fax cover-sheet which indicated he had not sent the form earlier because his son had fallen ill and had been in

the hospital. The Claimant reported on the questionnaire that he was self-employed on a part-time basis. He also indicated he had read the *Claimant Guide*. The Department investigator set up a meeting with the Claimant on November 16, 2010. She asked the Claimant to bring a copy of his business tax returns for the past two year, information regarding what he has been doing to get capital, and work search contact information.

The Department investigator met with the Claimant as planned. The Claimant sent the investigator an email message with a list of individuals he had met with that matched the contacts listed in his October 20 letter. He also brought a smaller list of six additional contacts between November 2009 and October 2010. The Claimant told the investigator he had been focusing his efforts on contacting members of the investment community, hoping that if one of the start-up companies he was helping was funded, he could get a job with the company. He discussed in detail one such company he had recently focused his efforts on, Viper. He explained he had made only four traditional job applications since January 2010. He indicated that he had not talked with the potential investors about other job opportunities, because he did not want to seem to lack confidence in the start-up companies he was assisting. After the meeting, the Department investigator set up a potential able and available and fraud issue for a Department adjudicator to review.

On November 19, 2010, the Department adjudicator mailed the Claimant a letter advising him that the Department was considering a potential overpayment for the benefit weeks ending May 2, 2009, through November 13, 2010, because the Claimant may not have been able and available for work during those weeks. The letter requested that the Claimant contact the adjudicator by November 29, 2010, to discuss the matter further. The Claimant did not respond to the letter. The Department adjudicator found the Claimant was not actively seeking work and denied benefits effective April 25, 2009. The Department adjudicator further found the Claimant had committed fraud when receiving benefits to which he was not entitled, and assessed a $33,467 overpayment and $33,367 penalty. The Claimant appealed to the Administrative Law Judge.

In the hearing before the Administrative Law Judge the Claimant provided testimony regarding his efforts to seek new employment and his efforts to secure funding for start-up companies which he hoped might employ him if and when they secured the necessary capital to begin operations.

The Administrative Law Judge affirmed the Department's decision denying benefits. The Claimant then filed a motion to reopen the hearing. The Department considered the request to be an appeal to the Board.

The Claimant argues his motion to reopen the hearing should be directed to the Administrative Law Judge and not to the Board. The Claimant specifically indicates his request is pursuant to R994-508-117 and quotes a portion of that rule in his request. The full rule states:

> **R994-508-117. Failure to Participate in the Hearing and Reopening the Hearing After the Hearing Has Been Concluded.**

(1) If a party fails to appear for or participate in the hearing, either personally or through a representative, the ALJ may take evidence from participating parties and will issue a decision based on the best available evidence.

(2) **Any party failing to participate, personally or through a representative, may request that the hearing be reopened.**

(3) The request must be in writing, must set forth the reason for the request, and must be mailed, faxed, or delivered to the Appeals Unit within ten days of the issuance of the decision issued under Subsection (1). Intermediate Saturdays, Sundays and legal holidays are excluded from the computation of the ten days in accordance with Rule 6 of the Utah Rules of Civil Procedure. If the request is made after the expiration of the ten-day time limit, but within 30 days, the party requesting reopening must show cause for not making the request within ten days. If no decision has yet been issued, the request should be made without unnecessary delay. If the request is received more than 30 days after the decision is issued, the Department will have lost jurisdiction and the party requesting reopening must show good cause for not making a timely request.

(4) If a request to reopen is not granted, the ALJ will issue a decision denying the request. A party may appeal a denial of the request to reopen to the Board within 30 days of the date of issuance of the decision. The appeal must be in writing and set forth the reason or reasons for the appeal. The appeal can only contest the denial of the request to set aside the default and not the underlying merits of the case except as provided in R994-508-118(2)(f).

(5) The ALJ **may** reopen a hearing **on his or her own motion** if it appears necessary to take continuing jurisdiction or if the failure to reopen would be an affront to fairness.

(6) If the request to reopen is made more than 30 days after the issuance of the ALJ's decision, the ALJ may consider the request or refer it to the Board to be treated as an appeal to the Board. [emphasis supplied]

The full context of the rules makes it clear the procedure for requesting reopening of a hearing is applicable only to those parties who fail to appear personally or by representative. The rules which explain the grounds for reopening further make it clear that reopening is a remedy available for those parties who have not already had an opportunity to appear before an Administrative Law Judge:

R994-508-118. What Constitutes Grounds to Reopen a Hearing.

(1) The request to reopen will be granted **if the party was prevented from appearing at the hearing** due to circumstances beyond the party's control.

(2) The request may be granted upon such terms as are just for any of the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the decision. The determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all of the relevant circumstances including:

(a) the danger that the party not requesting reopening will be harmed by reopening;

(b) the **length of the delay caused by the party's failure to participate** including the length of time to request reopening;

(c) the reason for the request including **whether it was within the reasonable control of the party requesting reopening**;

(d) whether the party requesting reopening acted in good faith;

(e) whether the party was represented at the time of the hearing. Attorneys and professional representatives are expected to have greater knowledge of Department procedures and rules and are therefore held to a higher standard; and

(f) whether based on the evidence of record and the parties' arguments or statements, taking additional evidence might affect the outcome of the case.

(3) Requests to reopen are remedial in nature and thus must be liberally construed in favor of providing parties **with an opportunity to be heard and present their case**. Any doubt must be resolved in favor of granting reopening.

(4) Excusable neglect is not limited to cases where the **failure to act** was due to circumstances beyond the party's control.

(5) The ALJ has the discretion to schedule a hearing to determine if a party requesting reopening satisfied the requirements of this rule or may, after giving the other parties an opportunity to respond to the request, grant or deny the request on the basis of the record in the case. [emphasis supplied]

Therefore, the Board properly considered the Claimant's "motion to reopen the hearing" to be an appeal to the Board.

The Board may remand a hearing to the Administrative Law Judge when appropriate. Department rules provide:

> **R994-508-305. Decisions of the Board.**
>
> (1) The Board has the discretion to consider and render a decision on any issue in the case even if it was not presented at the hearing or raised by the parties on appeal.
>
> (2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.
>
> (3) The Board has the authority to request additional information or evidence, if necessary.
>
> (4) The Board my remand the case to the Department or the ALJ when appropriate.
>
> (5) A copy of the decision of the Board, including an explanation of the right to judicial review, will be delivered or mailed to the interested parties.

The Claimant's arguments supporting his motion to reopen the hearing can be considered arguments in favor of remanding the hearing. The Claimant argues he was clearly not prepared for the hearing, he was not represented by counsel, did not understand he must provide additional documentation prior to the hearing, and did not realize he could request a continuance of the hearing in order to obtain counsel.

A remand is not appropriate in this case. The Claimant personally appeared in the hearing in this matter and was given a full and fair opportunity to present his evidence. The Claimant testified at length regarding his job search and efforts to network with investors and members of various boards of directors. The Appeals Unit also provided the Claimant with substantial guidance concerning the hearing. Prior to the hearing, the Claimant was mailed a notice of hearing and a brochure regarding appeals of unemployment decisions. The notice of hearing contained many instructions, including the following:

> **RESCHEDULING:** To ensure a prompt hearing, rescheduling requests are rarely granted. The simple convenience of a party is not a reason to reschedule. Speak to the judge IMMEDIATELY if you are unable to participate at the scheduled hearing time. You must tell the judge why you need to reschedule. ...

*** **READ THE APPEALS BROCHURE. YOU WILL BE RESPONSIBLE FOR THE INFORMATION IN THE BROCHURE.** Additional information regarding unemployment insurance appeals may be found online at: http//www/jobs.utah.gov/appeals/. If you have any questions about the above information, please call 801-526-9300 or 1-877-800-0671. ***

ABOUT THE HEARING: The hearing is your opportunity to present ALL testimony and evidence on the issues. In the event of a further appeal, testimony and evidence that could have been presented at the original hearing may not be allowed. . . .

RIGHT TO REPRESENTATION: You may have an attorney or other representative represent you in the hearing. You are responsible to pay any fees required by the attorney or representative. Provide the name and telephone number of your attorney or representative when you provide your telephone number for the hearing. . . .

DOCUMENTS: Enclosed are documents that may be made part of the hearing record. . . .

If you have additional documents to be considered by the judge, you MUST mail, fax, or hand-deliver the documents to the judge and **all other parties at least three days before** the hearing. . . .

Documents not provided in a timely manner may not be considered by the Judge. . . .

IF YOU HAVE ANY QUESTIONS PERTAINING TO THE HEARING, CALL THE APPEALS UNIT AT 801-526-9300 or 877-800-0671.

Send all documents or written requests to: Department of Workforce Services
Appeals Unit
Box 45244
Salt Lake City, UT 84145-0244
Fax Number: (801) 526-9242 [emphasis in original]

The appeals brochure gives a more detailed explanation of the hearing procedure. The brochure says, in part:

PREPARATION FOR THE HEARING

The hearing before the ALJ is your **only** chance to present everything relevant to the case. A record of the hearing will be made and the ALJ may consider only the

evidence introduced during this hearing. Further review and decisions on appeal are limited solely to the evidence introduced at this hearing.

Take time to prepare for your hearing. Know the issue or issues involved. Obtain documents that help prove your facts and provide them to the ALJ and opposing party. Also, be sure to line up witnesses which support your side of the case. To help you remember what you want to present at the hearing, you may prepare a simple outline or written summary with the key information you want to present. ...

ATTORNEY OR OTHER REPRESENTATIVE

You have the right to hire your own representative, who may or may not be a lawyer, to help you at the hearing. Historically, most parties do not have a representative at their appeal. The ALJ is an active participant in the hearing and will question both parties to gather the relevant facts of the case. However, if the facts in your case are complicated, there are many legal issues involved, or you don't feel comfortable doing it alone, you are allowed to have someone help you prepare and present your case.

If you choose to hire a representative, contact your representative immediately to allow them sufficient time to prepare for the hearing. It is your responsibility to notify them of the time and place of the hearing and to pay any fees charges for such representation. (Attorneys for claimants may not bill the claimant for their services without the ALJ's prior approval of their fees.) During the hearing, if you feel you need a representative, you may ask the ALJ for time to get one. The ALJ will decide whether or not to allow your request. ...

DOCUMENTS AND OTHER EVIDENCE

Copies of the documents that will be used as exhibits in the hearing are sent to both parties prior to the hearing. Read them carefully and have them available during the hearing.

If you want the ALJ to consider other documents, you must mail or fax a copy of these papers immediately to the Appeals Unit and to the other party who received notice of the hearing so the documents will be received with adequate time to be reviewed before the hearing. ...

RESCHEDULING A HEARING

You must make every effort to participate in the hearing at its appointed date and time. ...

You may request that your hearing be rescheduled for another date and/or time. Your request for a rescheduling will be granted only for "cause." The Appeals Unit may

> grant your request if the reasons for the request are beyond your reasonable control or if holding the hearing would be harmful or unfair to you. [emphasis in original]

The Claimant was given adequate notice he had the right to have a representative in the hearing and to provide any additional documentation to the Administrative Law Judge prior to the hearing. The Board also notes the hearing on this matter was originally scheduled to be held on January 10, 2011. The Claimant followed the instructions to reschedule the hearing so he may attend a job interview in California and the Appeals Unit rescheduled the hearing for January 12, 2011. If the Claimant was not adequately prepared for the hearing, or felt he needed representative once the hearing began, the Claimant could have asked the Administrative Law Judge for another continuance.

The Claimant also argues that certain documentation he provided the Department would be made part of the record and was not. The Board has thoroughly reviewed the record in this matter and can find no evidence of the allegedly missing documents. The record demonstrates that the Claimant's letter to the Department, his completed questionnaire, his email message to the Department investigator and notes he brought to the meeting with the investigator were made part of the record of case number 10-A-19782. Furthermore, the Claimant testified that the job contact list he sent to the Department investigator by email was made part of the hearing record:

> CLAIMANT ... Anyway, my meeting with Ms. Causey, I - we were talking a little bit about the job search but she didn't have the list that I had sent in previously, and so I emailed her another copy of it; that's Exhibit 14 and 15.
>
> And I believe that 16 was appended to that because those were some - I had been trying to work to make the list more comprehensive and update it, and so those were just kind of an update when I sent Exhibit 14 and 15; as I recall that's what those are. I'm just trying to make it - and since then, as I mentioned earlier, I've taken this list and made it more comprehensive by adding contact information and going through all of my records and finding other contacts that I've made and adding them to the list.

Even though the Administrative Law Judge did not allow him to add the more comprehensive list to the exhibits, the Claimant could have read from the document he prepared. In fact, the Administrative Law Judge specifically advised the Claimant he could provide testimony about the more comprehensive list:

> CLAIMANT I have prepared a more comprehensive list of the - of my job search efforts. And I don't know whether it's necessary for me to submit that right now, but I was wondering if there was a way that I could. It's a spreadsheet that I could email. I'm going to be referring to it while I

speak today. That was really my only question is whether it was possible to -

JUDGE Okay. Any additional documentation needed to be sent out prior to the hearing starting. And was there a reason that you didn't send that out previously, or submit that previously?

CLAIMANT Well, I just wasn't sure who to send it to or how to do that. I guess I should have asked somebody.

JUDGE Okay. In the notice of the hearing it explains if you have any additional documentation you'd like to send in, it needs to be sent in to all parties at least three days before the hearing -

CLAIMANT Okay.

JUDGE - to give the parties an opportunity to review it. So I wouldn't accept any additional documentation at this point. You can - if you can provide testimony about it today during the hearing, then you can certainly do that.

CLAIMANT Okay.

The Board further notes that while the Board generally will not consider new evidence on appeal, the Claimant's additional documentation regarding his job search contacts referred to in the above testimony was taken into consideration when making this decision to the extent that the Claimant provided testimony regarding the information contained in the document.

The Board now turns to the merits of the case at hand. In a separate decision, the Board found the Claimant was not actively seeking work while filing claims for benefits. Therefore, the Claimant was not entitled to the $33,467 in benefits he received. Whenever a claimant is paid benefits to which he or she is not entitled, an overpayment is created. It must then be determined if that claimant committed fraud when receiving benefits to which the claimant was not entitled. To establish fraud, the Department must establish three elements: materiality, knowledge, and willfulness. The Administrative Law Judge cited in full the Department rules defining the elements of fraud; therefore, those rules are not reproduced here.

The first element of fraud is materiality. Materiality is established when a claimant makes a misrepresentation or omission for the purpose of obtaining any benefit to which the claimant is not entitled. The Claimant failed to advise the Department he was not contacting employers as instructed by the Department. Although the Claimant was networking in an attempt to find job openings, he was not actually consistently contacting companies which might potentially employ

him. Even considering the Claimant's new evidence on appeal, as explained in the companion to this case, case number 11-B-00185, there were several months during which the Claimant failed to make contact with any employer which might hire him, yet each week he certified under penalty of law that he had contacted employers for work as instructed by the Department. The Claimant would not have received benefits if he had provided accurate information to the Department when filing his claims. The Claimant's actions satisfy the materiality element of the fraud analysis.

The next element of fraud is knowledge. To demonstrate knowledge, the Department must establish the Claimant knew or should have known the information he submitted to the Department was incorrect. The Claimant admits he received and read the *Claimant Guide*. The *Claimant Guide* is written in clear language. The *Claimant Guide* instructs claimants that "a primary component of your re-employment plan will be to contact employers." It instructs claimants to contact "employers not previously contacted" each week, not potential investors, wives of potential employers or friends. The *Claimant Guide* also clearly describes networking as an "additional job-development" activity, not as evidence of making job contacts. The *Claimant Guide* also instructs Claimants to keep detailed records of their job search contacts. The Claimant's actions satisfy the knowledge element of the fraud analysis.

The final element of fraud is willfulness. Willfulness is established when a claimant files claims or other documents containing false statements, responses, or deliberate omissions. The declarations made by claimant on his or her weekly filings is the information relied upon by the Department to establish benefit eligibility and calculate the amount of benefits to which the claimant is entitled. It is the duty of the Department to get benefits to unemployed workers without undue delay, and it is the responsibility of the filing parties to provide accurate information to the Department. The Utah Supreme Court has held that both the initial and continuing responsibility of establishing eligibility to receive benefits rests with the claimant. *Baker v. Department of Employment Sec.*, Indus. Comm'n, 564 P.2d 1126, 1127 (Utah, 1977).

The record in this case establishes that the Claimant received a clear explanation of his responsibilities from the Department, both from Department representatives and in the form of a copy of the *Claimant Guide*, advising him of the requirements to qualify for and remain eligible for receipt of benefits. These instructions can be ignored or disregarded only at the peril of the party claiming entitlement to benefits.

The elements of fraud are set forth in Utah Code Annotated §35A-4-405(5), specifically subsection (a) which provides, in relevant part:

> Except as otherwise provided in Subsection (5), an individual is ineligible for benefits or for purposes of establishing a waiting period . . . For each week with respect to which the claimant willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under the provisions of this chapter....

The rule interpreting the above statutory language and establishing the requirement for a finding on the willfulness element of fraud, Utah Administrative Code R994-405-502(3), provides, among other things, that "[w]illfulness is established when a claimant files claims or other documents containing false statements, responses or deliberate omissions."

The Utah Supreme Court ruled in *Mineer v. Board of Review*, 572 P.2d 1364 (Utah 1977) that:

> The intention to defraud is shown by the claims themselves which contain false statements and fail to set forth material facts required by statute. The filing of such claims evidences a purpose or willingness to present a false claim in order to obtain unlawful benefits and hence are manifestations of intent to defraud.

In attempting to define "willful" as used in statutory language, the United States Supreme Court stated:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus §622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. *McLaughlin v. Richland Shoe Co.*; 486 U.S. 128, 133 (1988).

There is clear and convincing evidence in the record that the Claimant willfully and repeatedly failed to report to the Department that he was not contacting at least two potential employers each week. The Claimant's actions satisfy the willfulness element of the fraud analysis. All of the elements of fraud have been established. Therefore, the Claimant committed fraud in receiving benefits to which he was not entitled.

The unemployment insurance rules pertaining to §35A-4-405(5) of the Utah Employment Security Act provide, in pertinent part:

> **R994-406-403. Fraud Disqualification and Penalty.**
>
> (1) Penalty Cannot be Modified.
>
> The Department has no authority to reduce or otherwise modify the period of disqualification or the monetary penalties imposed by statute. The Department cannot exercise repayment discretion for fraud overpayments and these amounts are subject to all collection procedures.
>
> (2) Week of Fraud.

(a) A "week of fraud" shall include each week any benefits were received due to fraud. The only exception to this is if the fraud occurred during the waiting week causing the next eligible week to become the new waiting week. In that case, the new waiting week will not be considered as a week of fraud for disqualification purposes. However, because the new waiting week is a non-payable week, any benefits received during that week will be assessed as an overpayment and because the overpayment was as a result of fraud, a fraud penalty will also be assessed. . .

(3) Disqualification Period. . . .

(b) The disqualification period begins the Sunday following the date the Department fraud determination is made.

(4) Overpayment and Penalty.. . .

(b) For all fraud decisions where the initial department determination is issued on or after July 1, 2004, the claimant shall repay to the division the overpayment and, as a civil penalty, an amount equal to the overpayment. The overpayment in this subparagraph is the amount of benefits the claimant received by direct reason of fraud. . .

R994-406-405. Future Eligibility in Fraud Cases.

A claimant is ineligible for unemployment benefits or waiting week credit after a disqualification for fraud until any overpayment and penalty established in conjunction with the disqualification has been satisfied in full. Wage credits earned by the claimant cannot be used to pay benefits or transferred to another state until the overpayment and penalty are satisfied. An outstanding overpayment or penalty may NOT be satisfied by deductions from benefit payments for weeks claimed after the disqualification period ends, as a claimant is precluded from receiving any future benefits or waiting week credit as long as there is an outstanding fraud overpayment. However, a claimant may be permitted to file a new claim to preserve a particular benefit year. An overpayment is considered satisfied as of the beginning of the week during which payment is received by the Department. Benefits will be allowed as of the effective date of the new claim if a claimant repays the overpayment and penalty within seven days of the date the notice of the outstanding overpayment and penalty is mailed.

The penalties for fraud are harsh, but due to the nature of the unemployment insurance program it is necessary they be so to protect the integrity of the program. The unemployment insurance program is not a financial aid program based upon need but, as the name implies, an insurance program funded entirely by employer contributions. An applicant for benefits must meet certain

eligibility requirements in order to participate. The program is largely based upon a self-reporting honor system in which applicants are expected to provide correct information to the Department so their eligibility and amount of benefits can be correctly determined. There is no provision in the Utah Employment Security Act which would allow the Board to reduce or modify the statutory penalty for the fraudulent receipt of unemployment insurance benefits.

The Claimant received $33,467 in benefits to which he was not entitled as a direct result of the fraud and is subject to a penalty in an equal amount, for a total overpayment of $66,934. The Claimant is further disqualified from receiving benefits for 49 additional weeks beginning December 5, 2010, the Sunday following the issuance of the original fraud determination.

The Board adopts the Administrative Law Judge's reasoning and conclusions of law in full.

DECISION:

The decision of the Administrative Law Judge denying benefits for the weeks ending May 9, 2009, through October 16, 2010, and disqualifying the Claimant for 49 additional weeks beginning December 5, 2010, and ending November 12, 2011, under the provisions of §35A-4-405(5) of the Utah Employment Security Act is affirmed.

The overpayment and penalty of $66,934 established by the Department pursuant to §§35A-4-405(5) and 35A-4-406(4) remain in effect.

APPEAL RIGHTS:

Pursuant to §63G-4-302(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63G-4-302(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230,

Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63G-4-401 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: March 10, 2011

TH/CN/DW/JH/AM/cd

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 10th day of March, 2011, by mailing the same, postage prepaid, United States mail to:

JOSEPH E HATCH
ATTORNEY AT LAW
5295 S COMMERCE DR STE 200
MURRAY UT 84107

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525

APPENDIX "D"

Form BRDEC
Issue 11

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

DAVID D. ADAMS, CLAIMANT
S.S.A. No. XXX-XX-4307

Case No. 11-B-00185

DEPARTMENT OF WORKFORCE SERVICES

DECISION OF WORKFORCE APPEALS BOARD:
The decision of the Administrative Law Judge is affirmed.
Benefits are denied.

HISTORY OF CASE:

In a decision dated January 12, 2011, Case No. 10-A-19782, the Administrative Law Judge affirmed a Department decision denying unemployment insurance benefits to the Claimant effective April 26, 2009, through November 20, 2010.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

CLAIMANT APPEAL FILED: February 11, 2011.

ISSUE BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISION OF UTAH EMPLOYMENT SECURITY ACT:

Did the Claimant pursue an active work search as required by the provisions of §35A-4-403(1)(c)?

FACTUAL FINDINGS:

The sentence, "The Department considers a contact to be an application or submission of a letter of interest or resume for a verifiable position for which the Claimant may be eligible," is stricken because the statement is not in keeping with R994-403-113c(2) which states, "contacts should be made with employers that hire people in the claimant's occupation or occupations for which the claimant has work experience or would otherwise be qualified and willing to accept employment."

With this correction, the findings of fact of the Administrative Law Judge are adopted in full.

REASONING AND CONCLUSIONS OF LAW:

The Claimant opened a claim for unemployment insurance benefits in April 2009 using the Department's Internet filing system. After the Claimant provided the information requested on the application, the Claimant was given several instructions, including:

> You must be able and available for and actively seeking full time work by making at least 2 new job contacts each week. You must keep a written record of your job contacts.

And:

> You will receive a claimant guide within a week. You will be held responsible for knowing the information in this guide. If you have any questions, call the Claims Center.

On May 14, 2009, the Claimant certified he had received a copy of the *Claimant Guide: Unemployment Insurance Benefits.* The *Claimant Guide* provides instructions regarding the Claimant's obligation to actively seek work and to maintain a detailed record of his work search. Page 12 of the *Claimant Guide* (Rev 1/09) states, in pertinent part:

> **Work Search Requirements**
>
> Your obligation while receiving unemployment benefits is to become reemployed, and you should develop a realistic plan to achieve this objective. A primary component of your re-employment plan will be to contact employers. Unless a Department representative instructs otherwise, you are required to make a good faith effort to seek full-time work each week that you claim benefits, even if you are employed part time.
>
> Additional job-development activities that will enhance your prospects of finding work include: writing resumes, visiting employers' web sites, networking, contacting private or church employment agencies or visiting a DWS Employment Center. The phrase "good faith effort to seek work" means that you will consistently make the types of personal efforts to find work that are customary for persons in the same or similar occupations. Your efforts must reflect a genuine desire to obtain employment immediately.
>
> **You should make at least two contacts each week with employers not previously contacted.** If you do not make at least two new contacts during a given week, you may be denied benefits; however, the Department will evaluate your overall work-search efforts during the week before making an eligibility determination.

> You are required to keep a detailed record of your work search activities. You may be selected at any time for an audit or eligibility review during which you will be asked to provide this information. Your record of employer contacts should include the following: (1) date of contact, (2) company name and phone number, (3) person contacted, (4) type of work, (5) method of contact and (6) results. **Failure to provide this information upon request may result in a denial of benefits and possible overpayments and penalties.**
>
> As your period of unemployment continues, you must expand your work search to include work at lower rates of pay. [emphasis in original]

Pages 22 and 23 of the *Claimant Guide* provide a Job Search Record, which is a chart wherein claimants may record job contacts. The chart provides space to record the date of the contact, the name of the person contacted, the company name and phone number, the method of contact, the type of work, and the results of the contact.

The Claimant opened an emergency claim for benefits in December 2009. He filed that claim by contacting the Claims Center. A claims center representative read the Claimant the same instructions quoted above regarding seeking work, keeping a written record of job contacts, and reviewing the *Claimant Guide*. On December 14, 2009, the Claimant certified he had received another copy of the *Claimant Guide*. He opened a new claim for benefits in April 2010. He also filed that claim by contacting the Claims Center. A claims center representative again read the Claimant the above quoted instructions. On May 10, 2010, the Claimant certified he had received yet another copy of the *Claimant Guide*.

The Claimant filed weekly claims for benefits between April 25, 2009, and December 4, 2010, using the Department Internet filing system. Each week the Claimant was asked, "Did you contact employers for work as you were instructed by the Department?" and "Were you physically able and available for full time work?" Each week the Claimant answered, "yes," to those questions, then certified under penalty of law he had answered the questions truthfully and accurately. The Claimant received a total of $33,467 in unemployment insurance benefits and federal economic stimulus benefits in 2009 and 2010.

On October 5, 2010, the Department sent the Claimant a "Claimant Questionnaire." The questionnaire indicated the Claimant's answers would be used to determine if he was paid unemployment insurance benefits properly. Among other things, the questionnaire inquired about whether the Claimant was self-employed and whether he was looking for full-time work for himself with a regular employer. The questionnaire asked the Claimant to provide a list of job search contacts, including the date of contact, the name of the person contacted, whether the person was contacted in person or by phone, the type of work sought, the full name, address, and phone number of each company, and the results of the contact. The weekly work search contacts form further

indicated the Department may verify job contacts with the potential employers listed on the completed form.

On October 20, 2010, the Claimant prepared a letter to the Department investigator. The letter stated, in part:

> I received the audit notification earlier this month, and though I immediately filled out the required forms, I have been unable to fill out the requested "Weekly work search contacts." And I've been delaying sending the paperwork back in because I've been uncertain about how to proceed.
>
> I realized months ago that it was going to be very difficult for me to find the kind of executive-level position at a software company that I'm qualified for, and during the past couple of months, I've only had one "official" job-seeking contact. . . .
>
> I decided months ago that my best option was not to look for a job, but to make my own, and so I have been working tirelessly meeting with Venture Capitalists and other investors trying to raise money for a new enterprise that will not only employ me, but at least a dozen other Utahns too. In this letter, I will catalog all of the investors that I have met with, and the various conferences I've attended in order to expand my network. One of the reasons I was uncertain about sending this letter, however, is that I understand that as a part of your audit, you're going to want to verify my work search contacts, but I feel very uneasy about the Department of Workforce Services contacting these investors. What I would ask is that if you need verification, please contact me, and I'll meet with you in person and we can discuss ways that you can verify that I made these contacts.

The Claimant then listed 34 investors with whom he had met and four venture capital/startup conferences he had attended. The Claimant faxed the letter and a completed copy of the questionnaire to the Department investigator on October 30, 2010. He also attached a fax cover-sheet which indicated he had not sent the form earlier because his son had fallen ill and had been in the hospital. The Claimant reported on the questionnaire that he was self-employed on a part-time basis. He also indicated he had read the *Claimant Guide*. The Department investigator set up a meeting with the Claimant on November 16, 2010. She asked the Claimant to bring a copy of his business tax returns for the past two year, information regarding what he has been doing to get capital, and work search contact information.

The Department investigator met with the Claimant as planned. The Claimant sent the investigator an email message with a list of individuals he had met with that matched the contacts listed in his October 20 letter. He also brought a smaller list of six additional contacts between November 2009 and October 2010. The Claimant told the investigator he had been focusing his efforts on contacting members of the investment community, hoping that if one of the start-up companies he was helping

was funded, he could get a job with the company. He discussed in detail one such company he had recently focused his efforts on, Viper. He explained he had made only four traditional job applications since January 2010. He indicated that he had not talked with the potential investors about other job opportunities, because he did not want to seem to lack confidence in the start-up companies he was assisting. After the meeting, the Department investigator set up a potential able and available and fraud issue for a Department adjudicator to review.

On November 19, 2010, the Department adjudicator mailed the Claimant a letter advising him that the Department was considering a potential overpayment for the benefit weeks ending May 2, 2009, through November 13, 2010, because the Claimant may not have been able and available for work during those weeks. The letter requested that the Claimant contact the adjudicator by November 29, 2010, to discuss the matter further. The Claimant did not respond to the letter. The Department adjudicator found the Claimant was not actively seeking work and denied benefits effective April 25, 2009. The Claimant appealed to the Administrative Law Judge.

In the hearing before the Administrative Law Judge the Claimant provided testimony regarding his efforts to seek new employment and his efforts to secure funding for start-up companies which he hoped might employ him if and when they secured the necessary capital to begin operations.

The Administrative Law Judge affirmed the Department's decision denying benefits. The Claimant then filed a motion to reopen the hearing. The Department considered the request to be an appeal to the Board.

The Claimant argues his motion to reopen the hearing should be directed to the Administrative Law Judge and not to the Board. The Claimant specifically indicates his request is pursuant to R994-508-117 and quotes a portion of that rule in his request. The full rule states:

> **R994-508-117. Failure to Participate in the Hearing and Reopening the Hearing After the Hearing Has Been Concluded.**
>
> (1) If a party fails to appear for or participate in the hearing, either personally or through a representative, the ALJ may take evidence from participating parties and will issue a decision based on the best available evidence.
>
> (2) **Any party failing to participate, personally or through a representative, may request that the hearing be reopened.**
>
> (3) The request must be in writing, must set forth the reason for the request, and must be mailed, faxed, or delivered to the Appeals Unit within ten days of the issuance of the decision issued under Subsection (1). Intermediate Saturdays, Sundays and legal holidays are excluded from the computation of the ten days in accordance with Rule 6 of the Utah Rules of Civil Procedure. If the request is made

after the expiration of the ten-day time limit, but within 30 days, the party requesting reopening must show cause for not making the request within ten days. If no decision has yet been issued, the request should be made without unnecessary delay. If the request is received more than 30 days after the decision is issued, the Department will have lost jurisdiction and the party requesting reopening must show good cause for not making a timely request.

(4) If a request to reopen is not granted, the ALJ will issue a decision denying the request. A party may appeal a denial of the request to reopen to the Board within 30 days of the date of issuance of the decision. The appeal must be in writing and set forth the reason or reasons for the appeal. The appeal can only contest the denial of the request to set aside the default and not the underlying merits of the case except as provided in R994-508-118(2)(f).

(5) The ALJ **may** reopen a hearing **on his or her own motion** if it appears necessary to take continuing jurisdiction or if the failure to reopen would be an affront to fairness.

(6) If the request to reopen is made more than 30 days after the issuance of the ALJ's decision, the ALJ may consider the request or refer it to the Board to be treated as an appeal to the Board. [emphasis supplied]

The full context of the rules makes it clear the procedure for requesting reopening of a hearing is applicable only to those parties who fail to appear personally or by representative. The rules which explain the grounds for reopening further make it clear that reopening is a remedy available for those parties who have not already had an opportunity to appear before an Administrative Law Judge:

R994-508-118. What Constitutes Grounds to Reopen a Hearing.

(1) The request to reopen will be granted **if the party was prevented from appearing at the hearing** due to circumstances beyond the party's control.

(2) The request may be granted upon such terms as are just for any of the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the decision. The determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all of the relevant circumstances including:

(a) the danger that the party not requesting reopening will be harmed by reopening;

(b) the **length of the delay caused by the party's failure to participate** including the length of time to request reopening;

(c) the reason for the request including **whether it was within the reasonable control of the party requesting reopening**;

(d) whether the party requesting reopening acted in good faith;

(e) whether the party was represented at the time of the hearing. Attorneys and professional representatives are expected to have greater knowledge of Department procedures and rules and are therefore held to a higher standard; and

(f) whether based on the evidence of record and the parties' arguments or statements, taking additional evidence might affect the outcome of the case.

(3) Requests to reopen are remedial in nature and thus must be liberally construed in favor of providing parties **with an opportunity to be heard and present their case**. Any doubt must be resolved in favor of granting reopening.

(4) Excusable neglect is not limited to cases where the **failure to act** was due to circumstances beyond the party's control.

(5) The ALJ has the discretion to schedule a hearing to determine if a party requesting reopening satisfied the requirements of this rule or may, after giving the other parties an opportunity to respond to the request, grant or deny the request on the basis of the record in the case. [emphasis supplied]

Therefore, the Board properly considered the Claimant's "motion to reopen the hearing" to be an appeal to the Board.

The Board may remand a hearing to the Administrative Law Judge when appropriate. Department rules provide:

R994-508-305. Decisions of the Board.

(1) The Board has the discretion to consider and render a decision on any issue in the case even if it was not presented at the hearing or raised by the parties on appeal.

(2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.

(3) The Board has the authority to request additional information or evidence, if necessary.

(4) The Board my remand the case to the Department or the ALJ when appropriate.

(5) A copy of the decision of the Board, including an explanation of the right to judicial review, will be delivered or mailed to the interested parties.

The Claimant's arguments supporting his motion to reopen the hearing can be considered arguments in favor of remanding the hearing. The Claimant argues he was clearly not prepared for the hearing, he was not represented by counsel, did not understand he must provide additional documentation prior to the hearing, and did not realize he could request a continuance of the hearing in order to obtain counsel.

A remand is not appropriate in this case. The Claimant personally appeared in the hearing in this matter and was given a full and fair opportunity to present his evidence. The Claimant testified at length regarding his job search and efforts to network with investors and members of various boards of directors. The Appeals Unit also provided the Claimant with substantial guidance concerning the hearing. Prior to the hearing, the Claimant was mailed a notice of hearing and a brochure regarding appeals of unemployment decisions. The notice of hearing contained many instructions, including the following:

RESCHEDULING: To ensure a prompt hearing, rescheduling requests are rarely granted. The simple convenience of a party is not a reason to reschedule. Speak to the judge IMMEDIATELY if you are unable to participate at the scheduled hearing time. You must tell the judge why you need to reschedule. ...

SPECIAL INSTRUCTIONS:

CLAIMANT: Provide a copy of your complete list of job search contacts, beginning with the effective date of the disqualification/allowance under appeal, to the Judge and other parties listed on this notice prior to the hearing.

*** **READ THE APPEALS BROCHURE. YOU WILL BE RESPONSIBLE FOR THE INFORMATION IN THE BROCHURE.** Additional information regarding unemployment insurance appeals may be found online at: http//www/jobs.utah.gov/appeals/. If you have any questions about the above information, please call 801-526-9300 or 1-877-800-0671. ***

ABOUT THE HEARING: The hearing is your opportunity to present ALL

testimony and evidence on the issues. In the event of a further appeal, testimony and evidence that could have been presented at the original hearing may not be allowed. . . .

RIGHT TO REPRESENTATION: You may have an attorney or other representative represent you in the hearing. You are responsible to pay any fees required by the attorney or representative. Provide the name and telephone number of your attorney or representative when you provide your telephone number for the hearing. . . .

DOCUMENTS: Enclosed are documents that may be made part of the hearing record. . . .

If you have additional documents to be considered by the judge, you MUST mail, fax, or hand-deliver the documents to the judge and **all other parties at least three days before** the hearing. . . .

Documents not provided in a timely manner may not be considered by the Judge. . . .

IF YOU HAVE ANY QUESTIONS PERTAINING TO THE HEARING, CALL THE APPEALS UNIT AT 801-526-9300 or 877-800-0671.

Send all documents or written requests to: Department of Workforce Services
Appeals Unit
Box 45244
Salt Lake City, UT 84145-0244
Fax Number: (801) 526-9242 [emphasis in original]

The appeals brochure gives a more detailed explanation of the hearing procedure. The brochure says, in part:

PREPARATION FOR THE HEARING

The hearing before the ALJ is your **only** chance to present everything relevant to the case. A record of the hearing will be made and the ALJ may consider only the evidence introduced during this hearing. Further review and decisions on appeal are limited solely to the evidence introduced at this hearing.

Take time to prepare for your hearing. Know the issue or issues involved. Obtain documents that help prove your facts and provide them to the ALJ and opposing party. Also, be sure to line up witnesses which support your side of the case. To help you remember what you want to present at the hearing, you may prepare a simple outline or written summary with the key information you want to present. ...

ATTORNEY OR OTHER REPRESENTATIVE

You have the right to hire your own representative, who may or may not be a lawyer, to help you at the hearing. Historically, most parties do not have a representative at their appeal. The ALJ is an active participant in the hearing and will question both parties to gather the relevant facts of the case. However, if the facts in your case are complicated, there are many legal issues involved, or you don't feel comfortable doing it alone, you are allowed to have someone help you prepare and present your case.

If you choose to hire a representative, contact your representative immediately to allow them sufficient time to prepare for the hearing. It is your responsibility to notify them of the time and place of the hearing and to pay any fees charges for such representation. (Attorneys for claimants may not bill the claimant for their services without the ALJ's prior approval of their fees.) During the hearing, if you feel you need a representative, you may ask the ALJ for time to get one. The ALJ will decide whether or not to allow your request. ...

DOCUMENTS AND OTHER EVIDENCE

Copies of the documents that will be used as exhibits in the hearing are sent to both parties prior to the hearing. Read them carefully and have them available during the hearing.

If you want the ALJ to consider other documents, you must mail or fax a copy of these papers immediately to the Appeals Unit and to the other party who received notice of the hearing so the documents will be received with adequate time to be reviewed before the hearing. ...

RESCHEDULING A HEARING

You must make every effort to participate in the hearing at its appointed date and time. ...

You may request that your hearing be rescheduled for another date and/or time. Your request for a rescheduling will be granted only for "cause." The Appeals Unit may grant your request if the reasons for the request are beyond your reasonable control or if holding the hearing would be harmful or unfair to you. [emphasis in original]

The Claimant was given adequate notice he had the right to have a representative in the hearing. He was also advised he must provide documentation regarding his work search contacts to the Administrative Law Judge prior to the hearing. The Board also notes the hearing on this matter was originally scheduled to be held on January 10, 2011. The Claimant followed the instructions to reschedule the hearing so he could attend a job interview in California and the Appeals Unit

rescheduled the hearing for January 12, 2011. If the Claimant was not adequately prepared for the hearing, or felt he needed representative once the hearing began, the Claimant could have asked the Administrative Law Judge for another continuance.

The Claimant also argues that certain documentation he provided the Department would be made part of the record and was not. The Board has thoroughly reviewed the record in this matter and can find no evidence of the allegedly missing documents. The record demonstrates that the Claimant's letter to the Department, his completed questionnaire, his email message to the Department investigator and notes he brought to the meeting with the investigator were made part of the record of case number 10-A-19782. Furthermore, the Claimant testified that the job contact list he sent to the Department investigator by email was made part of the hearing record:

> CLAIMANT . . . Anyway, my meeting with Ms. Causey, I - we were talking a little bit about the job search but she didn't have the list that I had sent in previously, and so I emailed her another copy of it; that's Exhibit 14 and 15.
>
> And I believe that 16 was appended to that because those were some - I had been trying to work to make the list more comprehensive and update it, and so those were just kind of an update when I sent Exhibit 14 and 15; as I recall that's what those are. I'm just trying to make it - and since then, as I mentioned earlier, I've taken this list and made it more comprehensive by adding contact information and going through all of my records and finding other contacts that I've made and adding them to the list.

Even though the Administrative Law Judge did not allow him to add the more comprehensive list to the exhibits, the Claimant could have read from the document he prepared. In fact, the Administrative Law Judge specifically advised the Claimant that he could provide testimony about the more comprehensive list:

> CLAIMANT I have prepared a more comprehensive list of the - of my job search efforts. And I don't know whether it's necessary for me to submit that right now, but I was wondering if there was a way that I could. It's a spreadsheet that I could email. I'm going to be referring to it while I speak today. That was really my only question is whether it was possible to -
>
> JUDGE Okay. Any additional documentation needed to be sent out prior to the hearing starting. And was there a reason that you didn't send that out previously, or submit that previously?

CLAIMANT Well, I just wasn't sure who to send it to or how to do that. I guess I should have asked somebody.

JUDGE Okay. In the notice of the hearing it explains if you have any additional documentation you'd like to send in, it needs to be sent in to all parties at least three days before the hearing -

CLAIMANT Okay.

JUDGE - to give the parties an opportunity to review it. So I wouldn't accept any additional documentation at this point. You can - if you can provide testimony about it today during the hearing, then you can certainly do that.

CLAIMANT Okay.

The Board further notes that while the Board generally will not consider new evidence on appeal, the Claimant's additional documentation regarding his job search contacts referred to in the above testimony was taken into consideration when making this decision to the extent that the Claimant provided testimony regarding the information contained in the document.

The Board now turns to the merits of the case at hand. The Claimant has his own business to which he devotes a certain amount of his time each week and which apparently provides him a small weekly income. In order to be considered unemployed, a claimant must be earning less than his weekly benefit amount, be working less than full-time hours, and be actively seeking work. The Department rules which define the meaning of "unemployed" state, in part:

R994-207-102. General Requirements for Eligibility.

(1) A claimant is unemployed and eligible for benefits if all of the following conditions are shown to exist:

. . .

(c) Available for and Seeking Other Full-time Work.

The claimant in addition to the subject work, must be available for and actively seeking full-time suitable work for another employer as defined by the suitable work test, Subsection 35A-4-405(3) and Section R994-405-309. A failure to make an active search for work will evidence a contentment with his current status and a conclusion that he is "not unemployed" shall be made. **The efforts of a claimant to seek work should be distinguished from those directed towards**

> **obtaining work for himself as an individual and those directed toward obtaining work or customers for his corporation or business. Efforts to obtain work for the business or corporation are evidence of continuing responsibilities but are not evidence of an individual's active search for other employment as required for eligibility.** A claimant who has marketable skills including: bricklaying, plumbing, and office manager, must be willing to seek and accept such work. He may not restrict himself to availability for the type of work he is currently performing on a less than full-time basis. The claimant's past work history is evidence of the effect of such employment on his attachment to the labor force. If he is unable or unwilling to accept any, but short term or casual labor because of continuing or pending responsibilities, he is "not unemployed". [emphasis supplied]

Thus, when an individual is seeking work for both his own business and for himself as an individual, the Department only considers his efforts to seek employment for himself as an individual when determining if he is actively seeking work.

In order to be eligible for benefits, a claimant is further required to be able and available for full-time work. Department rules provide:

> **R994-403-110c. Able and Available - General Definition.**
>
> (1) The primary obligation of the claimant is to become reemployed. A claimant may meet all of the other eligibility criteria but, if the claimant cannot demonstrate ability, availability, and an active good faith effort to obtain work, benefits cannot be allowed.
>
> (2) A claimant must be attached to the labor force, which means the claimant can have no encumbrances to the immediate acceptance of full-time work. The claimant must:
>
> (a) be actively engaged in a good faith effort to obtain employment; and
>
> (b) have the necessary means to become employed including tools, transportation, licenses, and childcare if necessary.
>
> (3) The continued unemployment must be due to the lack of suitable job opportunities.

One of the key components of being available for full-time work is to actively engage in a good faith effort to obtain full-time work. Department rules further provide:

R994-403-113c. Work Search.

(1) General Requirements.

A claimant must make an active, good faith effort to secure employment each and every week for which benefits are claimed. Efforts to find work must be judged by the standards of the occupation and the community.

(2) Active.

An active effort to look for work is generally interpreted to mean that each week **a claimant should contact a minimum of two employers not previously contacted** unless the claimant is otherwise directed by the Department. **Those contacts should be made with employers that hire people in the claimant's occupation or occupations for which the claimant has work experience or would otherwise be qualified and willing to accept employment.** Failure of a claimant to make at least the minimum number of contacts creates a rebuttable presumption that the claimant is not making an active work search. The claimant may overcome this presumption by showing that he or she has pursued a job development plan likely to result in employment. A claimant's job development activities for a specific week should be considered in relation to the claimant's overall work search efforts and the length of the claimant's unemployment. **Creating a job development plan and/or writing resumes may be reasonable and acceptable activities during the first few weeks of a claim, but may be insufficient after the claimant has been unemployed for several weeks.**

(3) Good Faith.

Good faith efforts are defined as those methods which a reasonable person, anxious to return to work, would make if desirous of obtaining employment. A good faith effort is not necessarily established simply by making a specific number of contacts to satisfy the Department requirement.

R994-403-114c. Claimant's Obligation to Prove Weekly Eligibility.

The claimant:

(1) has the burden of proving that he or she is able, available, and actively seeking full-time work:

(2) must report any information that might affect eligibility;

(3) must provide any information requested by the Department which is required to establish eligibility;

(4) must keep a detailed record of the employers contacted, as well as other activities that are likely to result in employment for each week benefits are claimed; and

(5) must immediately notify the Department if the claimant is incarcerated.

The Board notes that the above rules do not require a claimant to submit a resume or letter of interest for an actual position, as stated by the Department investigator in the hearing on this matter, but that the contact be with an employer that employs people in the claimant's field or a field in which the claimant is willing and able to accept work. Thus, the type of contact contemplated by the rule is contact with someone who might potentially hire the claimant in the future. Contact with someone who might be able to give the claimant leads to other companies or individuals who might hire the claimant, usually referred to as "networking," is certainly an essential part of any job search effort. However, networking is not the same thing as making a job contact.

The Claimant failed to meet his burden to demonstrate he conducted an active work search. The Claimant was required to contact at least two different potential employers each week. The Claimant was also expected to maintain a detailed record of his work search activities so he could provide the information to the Department if asked to do so. When asked by the Department investigator to provide the information, the Claimant submitted only the names of potential investors he had contacted on behalf of start-up companies, as well as noting four conferences he attended. He failed to provide any of the specific information requested by the Department investigator. The Claimant was instructed to provide information to the Administrative Law Judge as well. The special instruction on the second page of the hearing notice regarding submitting a list of job search contacts to the Administrative Law Judge before the hearing should have been obvious on either a casual or careful reading of the notice. That the Claimant chose not to carefully read the notice or chose to ignore the instruction does not excuse his failure to provide the requested job search information.

Furthermore, the comprehensive job contact list the Claimant briefly described in the hearing and provided in his motion to reopen the hearing, does not establish the Claimant conducted an active work search as contemplated by the above-quoted rules. Specifically, the job contact lists all but three of the investor contacts noted on the Claimant's October 20, 2010, letter to the Department investigator. Since the Claimant testified he did not actually seek employment from those investors themselves, and told the Department investigator that seeking employment from the investors would make it seem as if he did not have confidence in Viper, those 35 contacts cannot be considered legitimate job search contacts under the above-quoted rules. Also, several of the alleged job contacts are not with employers. The Claimant notes in the list a conversation with a friend where he "[h]eard about an job opportunity in Prague" and a conversation with the spouse of a potential employer. Those discussions might be appropriate networking opportunities but are not job contacts. Still other

"contacts" are clearly with new start-up companies lacking capital. A company lacking capital clearly cannot hire any employees.

If the previously submitted contacts are removed as invalid since the Claimant was not contacting those investors in order to obtain employment with the investors themselves but to secure capital for Viper or another start-up company, and if one removes the contacts with unfunded new start-ups and contacts which are actually "networking" as opposed to true job contacts, there are **at best** only 9 weeks between May 2009 and September 2010 during which the Claimant might have made an active work search. The information on the list alone is insufficient to establish the Claimant made an active work search those weeks when considered in conjunction with the Claimant's testimony. The Claimant admitted in his testimony that beginning in mid to late 2009 he was talking more to investors than to companies which might actually have a job for which he might be considered:

JUDGE Okay. All right. So after that separation and filing your claim what efforts were you making to obtain additional employment?

CLAIMANT Well, it started with, I guess, a combination of kind of traditional, you know, checking job boards, checking different kinds of job listings, applying for jobs that were - that were listed as being available, and **then just kind of hitting the networking really hard**, you know, calling up all of my former colleagues and making contacts and letting people know that I was looking for something new. And as months progressed it - you know, my applying for jobs that were listed, it became apparent to me that, that wasn't going to be very fruitful.

I never so much as got a call or an email back from any of those, even though I submitted many of them. And I think the reason is because the kind of job that I was - that I'm - you know, that I've done for the past fifteen or so years of my career, you don't necessarily get a, you know, top executive position from applying on monster.com. And I'm not even sure why people post the jobs there if they're not going to respond to them.

So I redoubled my efforts in trying to work my professional network and I started to **expand it to meeting with people who are in the financing side of the technology start up world** because that's been a source for me to find jobs in the past; being kind of identified by folks who are investing in technology companies and can identify position in firms that they are making investments in. **So I started in, I'd say, you know, mid to late 2009 putting more**

> **efforts into meeting with venture capitalist and angel investors and other people who are in that world.** [emphasis supplied]

Certainly the type of networking the Claimant is describing is a useful start to finding opportunities, but the investors themselves could not hire the Claimant, they could only point him in the direction of companies that might hire him. Finally, even considering all the "contacts" listed as credible, there were 26 weeks for which the Claimant provided no evidence of making a job contact, and 22 weeks for which the Claimant has provided evidence of only one job contact.

The Claimant has not demonstrated he made an active work search while filing claims for benefits. Therefore, benefits are denied effective April 26, 2009, through November 20, 2010. With these additions, the Board adopts the Administrative Law Judge's reasoning and conclusions of law in full.

DECISION:

The decision of the Administrative Law Judge denying benefits to the Claimant effective April 26, 2009, through November 20, 2010, pursuant to the provisions of §35A-4-403(1)(c) of the Utah Employment Security Act, is affirmed.

APPEAL RIGHTS:

Pursuant to §63G-4-302(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63G-4-302(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting

forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63G-4-401 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: March 10, 2011

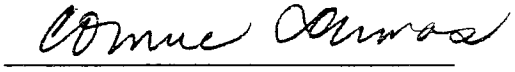
TH/CN/DW/JH/AM/cd

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 10th day of March, 2011, by mailing the same, postage prepaid, United States mail to:

JOSEPH E HATCH
ATTORNEY AT LAW
5295 S COMMERCE DR STE 200
MURRAY UT 84107

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525



APPENDIX "E"

Form BRDEC
Issue 10

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

DAVID D. ADAMS, CLAIMANT
S.S.A. No. XXX-XX-4307 :

Case No. 11-R-00410

:

RECONSIDERATION

DEPARTMENT OF WORKFORCE SERVICES :

DECISION OF WORKFORCE APPEALS BOARD:
Claimant's request for reconsideration is denied.

HISTORY OF CASE:

In letter received March 30, 2011, Claimant, David D. Adams, requested reconsideration of the decision of the Workforce Appeals Board issued in this case on March 10, 2011. The decision of the Workforce Appeals Board was based on a review of a decision of an Administrative Law Judge after a formal hearing.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Board has jurisdiction to review the request for reconsideration pursuant to Utah Code Annotated §63G-4-302(3) on the grounds that the Board's decision was final agency action within the meaning and intent of that section of law.

DECISION:

The Claimant's request for reconsideration is denied. The decision of the Workforce Appeals Board dated March 10, 2011, remains in effect.

APPEAL RIGHTS:

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63G-4-401 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: April 19, 2011

TH/CN/DW/JH/AM/cd

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 19th day of April, 2011, by mailing the same, postage prepaid, United States mail to:

JOSEPH E HATCH
ATTORNEY AT LAW
5295 S COMMERCE DR STE 200
MURRAY UT 84107

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525

APPENDIX "F"

Form BRDEC
Issue 10

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

DAVID D. ADAMS, CLAIMANT
S.S.A. No. XXX-XX-4307 :

Case No. 11-R-00411

:

RECONSIDERATION

DEPARTMENT OF WORKFORCE SERVICES :

DECISION OF WORKFORCE APPEALS BOARD:
Claimant's request for reconsideration is denied.

HISTORY OF CASE:

In letter received March 30, 2011, Claimant, David D. Adams, requested reconsideration of the decision of the Workforce Appeals Board issued in this case on March 10, 2011. The decision of the Workforce Appeals Board was based on a review of a decision of an Administrative Law Judge after a formal hearing.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Board has jurisdiction to review the request for reconsideration pursuant to Utah Code Annotated §63G-4-302(3) on the grounds that the Board's decision was final agency action within the meaning and intent of that section of law.

DECISION:

The Claimant's request for reconsideration is denied. The decision of the Workforce Appeals Board dated March 10, 2011, remains in effect.

APPEAL RIGHTS:

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63G-4-401 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: April 19, 2011

TH/CN/DW/JH/AM/cd

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 19th day of April, 2011, by mailing the same, postage prepaid, United States mail to:

JOSEPH E HATCH
ATTORNEY AT LAW
5295 S COMMERCE DR STE 200
MURRAY UT 84107

DAVID D ADAMS
2505 BEAR HOLLOW DR
PARK CITY UT 84098-8525